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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SONICRAFT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a dismissed unfair labor practice charge may be reinstated outside of the six-month period of limitations of NLRA section 10(b), contrary to the mandatory language of the statute and absent fraudulent concealment, as previously held by the Board in *Ducane Heating Corp.*:

   a. Where some of the allegations are dismissed and other portions of the charge found meritorious, the dismissed allegation is otherwise permitted to continue.

   b. Is the attempt to reinstate the "dead allegation" the same as impermissibly instituting an action without a charge, caused by the Board's *post hoc* claim of it being "closely related" to the pending portions of the charge, upon which a complaint had issued.

   c. Is an exception possible to Section 10(b) under a "continuing violation"/"closely related" theory, where the sole basis of the valid complaint alleging discriminatory recall of specific individuals is unrelated in theory to the previously dismissed portion of the charge, which was based on a prior mass layoff allegation antedating the recall allegation.

   d. Is any holding based upon the "continuing violation"/"closely related" theory prohibited in the instant case, where it was never asserted by the government or the Union as a timely defense either at the initial administrative hearing, at the initial appeal from the administrative hearing or as part of the initial Board remand instructions, as required by agency regulations.

2. Does the NLRB abuse its discretion when it reverses recently established rules under Section 10(b),

articulated in *Ducane Heating Corp.*, by reference to factual differences that are not based on logic, caselaw, or references to the statute.

3. Whether an employer business justification defense relating to broad economic reasons for its action in an unfair labor practice proceeding, and which reason is unrelated to employee job performance, could be accorded the *Wards Cove* rather than the *Transportation Management* burden of proof standard, under which the government at all times maintains the burden of proof.

    a. So that the government must demonstrate pretext by a preponderance of the evidence that the business justification reasons asserted by the employer would not have resulted in the layoffs, absent the allegation of union animus or union protected activity.

    b. So that under the NLRA, as under Title VII, the government is forbidden from substituting its judgment for that of the employer in the asserted economic defense where the defense is unrelated to job performance.

4. Whether the Board can rely upon an employer's protected comments and speech under NLRA Section 8(c), as evidence of a discriminatory animus, if not in itself prohibited § 8(a)(1) conduct, for purposes of finding the only "newly" discovered evidence in support of its belated "closely related" unfair labor practice charge.[1]

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[1]Sonicraft, Inc. is a closely-held, non-public corporation that has no parent companies, subsidiaries or affiliates. A Disclosure of Corporate Affiliations and Financial Interest was filed in the court of appeals.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SONICRAFT, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sonicraft, Inc., the charged party before the National Labor Relations Board ("Board"), respectfully prays that a petition for writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit which enforced the Board's decision in the above styled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 905 F.2d 146 (7th Cir. 1990). The decision of the National Labor Relations Board is reported at 295 N.L.R.B. No. 78, 133 L.R.R.M. (BNA) 1139 (1989). Both decisions are reprinted in the attached appendix at pages 1a and 10a, respectively. An unreported decision of the Board is reprinted at page 42a. The supplemental decision of the administrative law judge is reprinted at page 16a. The initial decision of the administrative law judge is reprinted at page 45a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1990. 8a. This Court has jurisdiction to review the judgment of the Seventh Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in relevant part:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c), provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether

in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Sonicraft, Inc., is a 100% minority owned company organized 24 years ago and is the largest Black-owned defense contractor in the United States. The Company employs mainly engineers involved in research, engineering, and development.

On December 11, 1981, an NLRB representation election was held among Petitioner's manufacturing employees. While the union initially prevailed in the election count, the results were subsequently set aside based upon objections to the election filed by Petitioner and sustained by the Board. *Sonicraft, Inc.*, 276 N.L.R.B. 407 (1985). On December 13, 1981, petitioner laid off 50 of its 92 workers in its production department due to a severe shortage of materials. This resulted from a persistent negative cashflow, bank overdrafts, an inability of Petitioner to get further loans from its bank to cover payroll, and, as a result, an inability to get production out of the plant. Tr. 1652-54. To efficiently use its remaining resources, the company was compelled to layoff those employees not involved in the manufacture of finished deliverable products. 82a-83a.

On February 22, 1982, the Warehouse, Mail Order, Office, Technical, and Professional Employees Union Local 743 filed an unfair labor practice charge alleging that Sonicraft had violated the National Labor Relations Act by the layoff of fifty employees and had separately alleged failure to recall workers because of union activities. Since the election loss, the union has not further petitioned the Board to become a certified bargaining

representative of Petitioner's workers; neither has the union filed a refusal to bargain charge with the Board.

On April 29, 1982, the Regional Director dismissed all portions of the charge that alleged the layoff was unlawful because "the evidence is insufficient to show that the Employer laid off its employees because they voted to select Local 743, International Brotherhood of Teamsters as their collective bargaining representative and because they engaged in other union and/or protected activities or for reasons other than the economic ones advanced by the Employer." 48a; General Counsel Ex. 1(e). The General Counsel's Office of Appeals in Washington, D.C., affirmed the Regional Director's decision to dismiss the layoff charge on a request for reconsideration of the decision to dismiss, filed by the union. The Regional Director subsequently issued a complaint against Petitioner limited to the failure to recall four workers who were alleged to be union organizers.

On October 6, 1982, a hearing on the complaint began before Administrative Law Judge ("ALJ") James J. O'Meara, Jr., on the single alleged discriminatory failure to recall four workers. On December 1, 1982, seven weeks into the hearing, the counsel for the General Counsel of the Board moved to amend the complaint to allege that Sonicraft had violated the Act by the layoff of workers, one year earlier, on December 13, 1981. Counsel for the General Counsel alleged that the motion was based upon an employee affidavit received the previous Friday (alleging a telephone conversation with a manager that the layoff occurred because of the union vote; GC Ex. 8), statements on a tape recording of employee question-answer sessions recently subpoenaed, and upon certain economic data that had previously been deemed irrelevant.[1] 48a.

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[1]The General Counsel's attorney argued to the ALJ in support of the motion to amend, that the "strongest evidence received by the Regional Director...was a witness who is [sic] not available to the Charging Party or to us, until very late on Friday." Transcript at 123-24 (Nov. 30, 1982). The second ground relied

The ALJ denied the motion to amend as being untimely on several grounds, including lack of "fairness, due process," tr. at 128, "bordering on an abuse of the Respondent in this case," tr. at 134,[2] that the Section 10(b) statute of limitations "preclude his now bringing this charge, or re-instituting a complaint," tr. at 125, "an abuse of discretion on my part" to allow the amendment, tr. at 123, and "the evidence...it's substantial that the company's financial position was precarious." Tr. at 198.[3] Petitioner also

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upon for the amendment was the employee question-answer statements of the Petitioner, transcribed from the subpoenaed tape recording, that the company had recently stipulated as accurate at the hearing for purposes of the single recall charge: "we took many weeks and many sessions of listening to that tape to be able to discern enough of it to have agreement on what was said." Tr. at 168 (Dec. 1, 1982). The General Counsel alleged that the stipulation provided it with the first "direct evidence of illegal motivation for the entire layoff....during the investigation, we had testimony from several employees that during Mr. Jones' speech, he made several statements which would indicate illegal motivation," tr. at 185, but had dismissed it because "there was no direct evidence of illegal motivation, which is a critical element." *Id.*. The Region also argued the economic data received earlier was now insufficient for Petitioner to make out an economic defense, although "the Employer presented a lot of evidence of economic defense," tr. at 185, because previously "it would be irrelevant in the case as it was presented." Tr. at 168.

[2]The ALJ was extremely concerned that the General Counsel had been using the two postponements in the trial of the case and the concomitant time in which to review material subpoenaed for the hearing, during an allowed postponement of the hearing, to result in unlawful discovery not permitted under Board rules, and using that discovery and an ongoing investigation based upon that discovery material, to amend the complaint. Tr. at 122. Counsel for the General Counsel even admitted Petitioner had a "right...not to be hit with an amendment because we have no opportunity to give them a chance to defend." Tr. at 127.

[3]The ALJ queried the Board's counsel concerning Petitioner's obvious financial straits: "Isn't it. Could you as a lawyer honestly tell me it wasn't?" Tr. at 198 (Dec. 1, 1982). The ALJ, however, informed counsel for the General Counsel that he would grant the motion to amend if she could show that the Regional Director relied upon false data ("evidence in error") provided by the company. Tr. at 191. The General Counsel replied that "they represented to us during the investigation that all he [Jerry Jones] said was what was in the

argued that the postponements of the hearing requested by the Regional Director to amend and investigate was also "extremely prejudicial" because Petitioner's backpay liability would continue to accrue as the Regional Director investigates his case further. Tr. at 153. On a special appeal by the counsel for the General Counsel, the Board reversed the ALJ and directed him to grant the mid-trial motion to amend. 49a. The Amended Complaint was filed on January 20, 1983.

On January 25, 1983, Sonicraft moved the Board for reconsideration of its decision as contrary to the clear and mandatory prohibition of the six-month limitations period established in Section 10(b) of the Act, which provides, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board...." 29 U.S.C. § 160(b). The Board denied the motion for reconsideration "without prejudice to Sonicraft's right to file exceptions." 49a.

On January 5, 1983, ALJ O'Meara voluntarily recused himself from the case and a new ALJ, Robert A. Gianassi, was appointed to hear the remainder of the case. Sonicraft filed an answer to the amended complaint which preserved its objections to the amendment. 49a.

B. The Initial ALJ and Board Decisions

On February 14, 1984, ALJ Gianassi, who had not personally heard the trial evidence predating his arrival, issued his decision finding that Sonicraft had violated Sections 8(a)(1) and (3) of the National Labor Relations Act by the layoff and subsequent recall of employees by Sonicraft. 45a. His decision made no reference

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prepared remarks." Tr. at 195. The ALJ replied that, "Now, you know that more than that was said, because there was a question answer period." *Id.* Counsel for the General Counsel admitted "we had employee testimony during the investigation that several of the things which that tape in fact now shows were said." Tr. at 156.

to any legal burden of proof applicable to the case, such as *Wright Line*, 251 N.L.R.B. 1083 (1980) or *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Exceptions were filed.

On March 27, 1985, the Board again remanded the case to the ALJ "limited" to "addressing the propriety of an amendment to the Complaint relating to December, 1981, employee layoffs and subsequent recalls in light of *Ducane Heating Corp.*, 237 NLRB 1389 (1985)." 42a. In *Ducane*, issued after ALJ Gianassi's initial decision, the Board ruled that the statute had barred the General Counsel from resurrecting a dismissed charge in a complaint outside the statute of limitations period in Section 10(b), except upon evidence of fraudulent concealment as its sole exception to § 10(b).

On December 11, 1985, ALJ Gianassi issued a supplemental decision upholding his original findings on a wholly different theory (other than the application of *Ducane Heating Corp.* upon which the Board had remanded the case to him), *viz.*, that the allegations in the amendment were "closely-related" to the properly filed charge concerning the alleged discriminatory recall, and therefore, the Board had jurisdiction to find the layoff was unlawful. 16a. Sonicraft argued that the closely-related doctrine had not been previously argued to the ALJ by the General Counsel and it was contrary to the Board's remand order.[4]

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[4]During the hearing on the amendment to which ALJ Gianassi had not presided, the counsel for the General Counsel actually argued that the layoff and recall allegations were "substantially different." ALJ O'Meara, had suggested that the Regional Director should file a second complaint, tr. at 203, rather than impair the ongoing hearing with the precipitous new allegations. Counsel for the General Counsel replied: "The cases are substantially different. The theories both of prosecution and defense, are substantially different, and I can imagine [sic] the complaining Respondent would do if after five days of hearing, we then attempted -- we would basically be doing it twice, Your Honor." Tr. at 169.

C. The Board's Decision

On exceptions filed by Petitioner, the Board in a 2-1 Supplemental Decision and Order issued on June 15, 1989, 10a, found that the amendment was "closely related to the content of the original charge," 13a n.3, but not explaining why it was valid under *Ducane Heating Corp.*, upon which it caused the case to be remanded to the ALJ four years earlier. 42a. The Board also failed to enunciate any legal test for applying a burden of proof upon either the General Counsel or Petitioner. The Board majority also failed to disclose why it rejected Petitioner's business defense that it was required to layoff workers because its unrestricted bank account was depleted, 91a, and it had on hand an excessive six-month inventory of parts and subassemblies that could not be completed because of a shortage of certain other parts. Tr. 1671. The Board also affirmed the limited discriminatory recall holding.

Chairman Stephens dissented in part to that portion of the Board's decision relating to inclusion of the lay-off allegation, because the Regional Director had been earlier aware of all the facts "when he opted, within his statutory discretion, not to prosecute that aspect of the case," 13a. Chairman Stephens also dissented on fundamental grounds of fairness.

D. The Court of Appeal's Decision

Sonicraft filed a timely petition for review of the Board's Decision and Order under Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 10(f). The circuit court, however, denied Petitioner's construction of the statute of limitations in section 10(b) that would bar resurrection of previously dismissed charges outside the six-month period on grounds *not* asserted by the Board. The circuit court also refused to find that Petitioner's business defense should have been decisive of the alleged unfair labor practice under *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) and the analytically similar business defense in disparate treatment cases under Title VII in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), because the General

Counsel failed to prove that Petitioner's business reasons for the layoff were either untrue or pretextual. 6a. Rather, the Seventh Circuit concluded that cases neither cited nor relied upon by the Board would support the Board's use of the "closely related" theory in these circumstances. the circuit court also determined that an employer's business defense under Title VII was not applicable here, and without further explanation stated that Petitioner had not met its burden, without explanation (like the Board had not explained) as to what that burden was. 7a.

REASONS FOR GRANTING THE WRIT

A. THE WRIT SHOULD BE GRANTED TO SETTLE THE CONFLICT BETWEEN THE CIRCUITS AND THIS COURT ON THE IMPORTANT STATUTORY QUESTION WHETHER THE GENERAL COUNSEL LOSES JURISDICTION TO SUBSTANTIVELY AMEND COMPLAINTS UNDER THE SECTION 10(B) STATUTE OF LIMITATIONS PERIOD TO COMPLAIN OF ACTS PREVIOUSLY DISMISSED FOR LACK OF CAUSE BY THE GENERAL COUNSEL

The decision below conflicts with the decisions issued by this Court concerning the bar of the statute of limitations under the National Labor Relations Act ("NLRA"). It has long been decided in the caselaw that the statute of limitations in the NLRA prohibits the Board from reaching back and permitting a complaint to be amended to encompass conduct beyond the six month period as violative of the Act. The "closely related" doctrine is one more attempt by the Board to accomplish such a feat.

In *Local Lodge 1424, Machinists v. NLRB*, 362 U.S. 411 (1960), this Court ruled that Section 10(b) barred the Board from declaring an act charged beyond the six month period to be a

"substantive" unfair labor practice, although the facts could be used as evidence in a timely proceeding on another charge so long as the legality of the earlier event would not be decisive of the event properly charged. 362 U.S. at 416. In *Machinists*, the Court held that if the Board could rule the act of signing a bargaining agreement to be unlawful in a later charge filed outside the six-month period, "the Board's position would withdraw virtually all limitations protection," 362 U.S. at 425, and disserve the interest in "industrial peace" established by Congress, which the Congress proscribed "even at the expense of the vindication of statutory rights." 362 U.S. at 429. The Court found in the case that the policy of the Act prohibits the use of facts in this manner outside of the Section 10(b) period.

Recently, in *Lorance v. AT & T Technologies, Inc.*, 109 S. Ct. 2261, 2268 (1989), this Court reaffirmed its view that Section 10(b) of the NLRA prevents the Board from declaring an unfair labor practice of events beyond six-months.[5] Quoting to *Machinists v. NLRB*, 362 U.S. at 417, the Court stated: "'[W]here a complaint based upon that earlier event is time-barred,' we reasoned, 'to permit the event itself' 'to cloak with illegality that which was otherwise lawful' 'in effect results in reviving a legally defunct unfair labor practice.'" Moreover, the Court in *Lorance* rejected use of the "continuing violation" doctrine to bend the statute of limitations under Title VII "to cure untimeliness," just as it had decided against the Board in Machinists. *Id.* n.4.[6]

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[5]The Congress' section by section analysis of the 1972 amendments to section 706(e) of Title VII provides that it "would permit charges to be filed [under] a limitation period similar to that contained in the Labor-Management Relations Act, as amended (29 U.S.C. 160(b))." S.Rep. No. 92-415, 36-37 (1971). This six month period has been applied to both unfair labor practice charges and hybrid suits for breach of contract under § 301, 29 U.S.C. § 185, of the NLRA. *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

[6]The Seventh Circuit's acceptance of the "closely-related" doctrine rejects the prohibition of the "continuing violation" theory rejected by this Court in *Machinists* without considering the impact on the Court's *Machinists* doctrine.

In the present case, there is a significant question presented whether the Seventh Circuit, in substituting its own judgment about the rule of the National Labor Relations Board in *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 118 L.R.R.M. 1145 (1985), strictly construing the statute of limitations found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), was correctly applied in this case without any attempt by the Board on its own to reconcile *Ducane*, with the Board's subsequent decision in *Redd-I*, 290 N.L.R.B. No. 140 (1988), or reconciliation of the Board's rule with the rule of this Court in *Machinists*.

Ducane involved three charges. The first charge was brought and dismissed by the General Counsel on the allegation that an employee had been wrongfully suspended on two prior occasions. Later two further charges were filed alleging the same worker had been discriminatorily discharged. A Complaint was brought by the General Counsel on the latter two charges. The General Counsel then attempted to resurrect the dismissed "suspension" charge by revoking the earlier dismissal on the basis of "newly discovered evidence." 273 N.L.R.B. at 1390. The ALJ then permitted the General Counsel to allege the earlier suspensions. On exceptions, the Board in *Ducane Heating Corp.*, held consistently with the mandatory language of Section 10(b), 29 U.S.C. 160(b), that "we shall treat withdrawn and dismissed charges alike and shall not allow the reinstatement of either beyond the 6-month limitations proviso absent special circumstances mentioned above [fraudulent concealment]." 273 N.L.R.B. at 1391. Thus,

> [T]he Regional Director contravened the purposes of the limitations proviso to Section 10(b) of the Act by reinstating a charge some **ten months** after McCrea's suspensions occurred. We note that, while the charge was timely filed on November 9, 1979, it was thereafter dismissed by the Regional Director, and no appeal from this dismissal was ever filed. *We hold today that a dismissed charge may not be reinstated outside the six months limitation period of Section 10(b)* absent special circumstances in which a respondent fraudulently

> conceals the operative facts underlying the alleged violation.

Ducane, 273 N.L.R.B. at 1390 (emphasis added).

> To permit the General Counsel to resurrect either withdrawn or dismissed charges is inconsistent with this principle and should be permitted only where a respondent, in effect, forfeits its right to such assurances by engaging in fraudulent conduct. We must, as the majority in *Winer*, "re-strike the balance established by Congress when it added the proviso to Section 10(b)."

Ducane, 273 N.L.R.B. at 1391, *quoting* 265 N.L.R.B. at 1458.

The Board today cites to the split decision (2-1) in *Redd-I*, *supra*, to reach agreement with the administrative law judge below, adverse to Petitioner, that "the discriminatory mass layoff, the selections for layoff, and certain refusals for recall from layoff are 'closely related' to the outstanding timely filed charge." 12a n.2. In *Redd-I*, a charge was filed alleging the discriminatory discharge of one employee, but this charge was later withdrawn. Five months later another charge was filed alleging the discharge of eight other workers. Three months later the second charge was amended to name the worker in the first charge. The ALJ refused the amendment.

The *Redd-I* panel majority claimed that *Ducane* and *Winer Motors*, 265 N.L.R.B. 1457 (1982), was inapplicable because,

> neither case involved an attempt to add closely related allegations to a pending charge. Rather each involved an attempt to reinstate the dead allegations themselves without reference to any other pending charge. Instead, we would apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, *without regard* to whether another charge encompassing the untimely allegation has been *withdrawn or dismissed*.

Redd-I, 129 L.R.R.M. at 1291 (footnote omitted).

Both Board cases state that withdrawn and dismissed charges will be treated alike, *Ducane* showing that both cannot be resurrected outside the six month period and *Redd-I* stating that they may be resurrected if "closely-related" to a timely charge. The Board fails to state why this distinction is significant, especially when section 10(b) makes no such distinction. Parties to Board cases are entitled to know what the statute means without such artificial distinctions attempted by the prevailing Board majority.[7]

This distinction is significant. In either case where the General Counsel exercises his discretion to dismiss a charge or where an untimely new charge is filed, that portion of the case is gone. To reinstate the events would be totally contrary to the statutory design. The Board in *Redd-I* or here, never shows a rationale to claim a justification for its view under the statute.[8]

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[7]The Board in *Redd-I* alleges that Ducane is distinguishable because "the dead allegations " were "without reference to any other pending charge." 129 L.R.R.M. at 1291. As demonstrated in the text, *supra*, the same union in Ducane filed each of the three charges involving the same employee; the first involving the employee's suspension and the latter two, the employee's discharge. Surely, the allegations in the discharge were "related" to the suspension, but the *Ducane* Board ruled that was a distinction without merit where the new charge is made more than six months after the initial occurrence. It was also on the basis of *Ducane* that the Board in 1985 remanded this case to the ALJ to consider the question whether to permit the layoff allegation to be amended in, because the ALJ had relied on overruled case law, *i.e.*, *California Pacific Signs*, 233 N.L.R.B. 450 (1977), in ruling against Sonicraft, 43a. That case was overruled in *Ducane*: "we reverse *California Pacific Signs*, *supra*, and *Winer Motors*, 265 NLRB 1457 (1982), to the extent they are inconsistent with our decision." *Ducane*, 273 N.L.R.B. at 1390.

[8]The ALJ also seized upon footnote 9 in *Ducane*, 273 N.L.R.B. at 1391 n.9, a reason that the majority did not accept, where Member Dennis separately concluded that in light of the "manner in which this case was litigated," it was unnecessary to pass on the question whether employee McCrea's suspension was "closely related" to Robinson's layoff. By referring to *NLRB v. Dinion Coil Co.*,

The events in the instant complaint relating to the alleged discriminatory recall of four workers by Petitioner, had nothing at all to do with the events which caused the layoff, neither in the business defense asserted by Petitioner or in the evidence in support thereof.

Consequently, there exists a discrete conflict within the Board's own caselaw concerning the application of section 10(b).[9] The meager attempt to distinguish *Ducane* in *Redd-I* creates a new Board rule of law with ramifications affecting the heart of the statutory policy struck by the Congress.[10] In fact,

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201 F.2d 484, 491 (2d Cir. 1952), she seeks to preserve the "closely related" doctrine for situations such as in *Dinion Coil* where an earlier discharge outside the 10(b) period was based upon the identical grounds articulated in a timely charge involving other workers. Member Dennis' footnote shows that if the closely related doctrine had been raised by the union in *Ducane* earlier, a fatal flaw in both Ducane and the instant case, she would have found that Robinson's layoff was closely related to McCrea's simultaneous suspension. But her remark did not concern the time-barred suspension of McCrea at issue in *Ducane* (Charge No. 11-CA-8748), which Member Dennis agreed was statutorily barred. Rather, Robinson's charge, No. 11-CA-8747, the existence of which, if it had been properly raised during the hearing of McCrea's timely dismissal charge (No.11-CA-9044), Member Dennis might have determined it was closely related to McCrea's suspension charge that was time-barred and possibly might have revived McCrea's charge. In any event, this whole footnote amounts to a dissent.

[9]During the pendency of the litigation involving Petitioner, seven Board Members have had the opportunity to consider the question presented. Four, Members Dennis, Hunter, Chairman Dotson and Chairman Stephens support the *Ducane* analysis. Three other Board Members, Devaney, Johansen and Cracraft, support the analysis in the instant case; the latter two participating in *Redd-I* and *Stearn Entertainment*, *infra*.

[10]In *Ducane*, the Board left open only one door that would toll the limitations period provided by section 10(b) concerning dismissed charges: fraudulent concealment. In doing so, the Board indicated that "we would exceed our own authority were we to permit the General Counsel to ignore the statutory limitations proviso." 273 N.L.R.B. at 1391. This statement is consistent with the ruling of the Court in *Machinists*.

the recision of all real meaning for § 10(b) was implemented against small employers who could not afford to review the rulings in a court of appeals under § 10(f). Hence, the nationwide impact of Board law is developed by administrative fiat.

Indeed, this conflict was recognized by the Seventh Circuit in the opinion below. Rather than requiring the administrative agency to explain the inconsistency in its opinions, the court of appeals "forged" an explanation for the Board's decision *sua sponte* by its citation to another Board split decision (2-1) in *Stem Entertainment System, Inc.*, 290 N.L.R.B. No. 167, 130 L.R.R.M. 1147, 1149 n. 3 (1988). 5a. That rationale, if proper, was not the Board's rule used against Petitioner. Under its statutory authority to review decisions under NLRA section 10(f), the circuit court cannot make up the explanation for the Board. Moreover, the alleged support the circuit court found for the Board was anything but obvious where the Board never cited the case as authoritative.

The Board has abruptly changed its view of the statute of limitations in the instant case without discussing *Ducane* which it had ordered applicable earlier to the case. 43a. To change a longstanding view of the statute, if at all, in accordance with acceptable standards of discretion allowed by this Court, an agency must explain those reasons in the case to which the change is applied.[11] *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 48 (1983).

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[11]The "closely-related" doctrine approved by the Seventh Circuit as an explanation for the Board's ruling was never raised by any party (the General Counsel, Union, or Sonicraft) on the first appeal to the Board and the Board never addressed the applicability of the "closely-related" doctrine to the earlier dismissal of the discriminatory lay-off charge at the time it permitted the amendment to the unfair labor practice complaint. 42a. Section 102.42(2)(h) of the Board's Rules and Regulations, prohibits arguing any issue not raised: "No matter not included in exceptions or cross exceptions may thereafter be argued before the Board, or in any further proceeding." The rule was ignored here.

The position of the Board and the Seventh Circuit represented in the case at bar is also not parochial to the instant case, but conflicts with settled decisions in other circuits, such as *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1963) and *NLRB v. Silver Bakery, Inc.*, 351 F.2d 37 (1st Cir. 1965). Moreover, the decision implicitly conflicts with a decision of the Second Circuit in *NLRB v. Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990).[12]

In *Electric Furnace Co., supra* at 375, the Regional Director withdrew a complaint and later sought to retract the withdrawal. Relying upon this Court's decision in *Machinists v. NLRB*, 363 U.S. 411 (1960), the court found the act alleged barred by Section 10(b).

In *Silver Bakery, Inc., supra* at 39, the First Circuit held that the General Counsel was barred from resurrecting withdrawn charge allegations. In its refusal to enforce the Board's order, the Court stated:

> [W]e can think of no good reason why the mere filing of a charge which is withdrawn with consent of the Board, so that no proceedings are pending, should leave in the Board a roving discretion to determine what so-called equities warrant the reinstitution of the proceedings without limit of time. The fact that the Board may feel that its discretion is benignly exercised cannot answer the clear purpose of a statute of limitations.

Similarly, it is a novel question whether the Board can conjure up a new doctrine thirty years after the decision in *Machinists* to "disrupt those valid reliance interests that § [10(b)]

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[12] In *Wizard Method, Inc., supra* at 1236, the Second Circuit had before it the issue whether a dismissed charge could be reinstated outside the six-month period of § 10(b). The Court found "merit to this contention," but the question was waived by the failure of the employer to timely raise the defense.

was meant to protect," 109 S. Ct. at 2269, through an unrefined "closely related" theory relying upon the thinnest of evidence, i.e., an employer question-answer session (upon which the General Counsel had fully investigated) having the same effect of cloaking an event with illegality, otherwise lawful as a matter of law, as the "continuing violation" theory rejected by the Court in *Machinists* did. Using the "closely-related" doctrine to bootstrap its jurisdiction, the Board does nothing but carve for itself a deliberate exception to Section 10(b), contrary to the legislative will.

The ALJ used two different legal theories in holding that Petitioner had violated the Act. In alleging that the recalls were unlawful, the ALJ addressed what he believed to be the union leaders' ability to effectively perform the jobs as basis for reinstatement by Petitioner. In finding the layoffs unlawful, he relied solely upon the employee speech given by Petitioner's President Jerry Jones.[13] The two bases are unrelated because they are based upon two different premises, just as the General Counsel alleged, tr. at 169 (they are "substantially different). *See also* footnote 4, *supra* at 9.

Furthermore, the Board completely failed to consider or reconcile the ruling of this Court in *Machinists*, where the Court warned that "in light of the language and evident purpose of § 10(b), only by a convincing showing that Congress did not intend the provision to bar attacks on collective agreements with unions lacking majority status unless brought within six months of their execution" could a doctrine breaking the six-month period be upheld. That "convincing showing" was not even attempted in

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[13]Petitioner would argue that the claimed § 8(a)(1) conduct in the speech was protected under the Act, but in any event, the General Counsel was previously aware of the alleged § 8(a)(1) statement, having interviewed all the witnesses and having been given a copy of the speech at the time. However, he decided to dismiss the layoff allegation. 48a. The Region was also persuaded by Sonicraft's significant economic problems. *See also* Chairman Stephens's dissent that the Regional Director already had this information. 13a.

this case which could be the only mechanism for the Board to lawfully gain jurisdiction to consider the layoffs as an independent unfair labor practice.

The circuit court, likewise, refused to consider Petitioner's argument that the express language of section 10(b) creates a conflict with an utterly free right to amend charges by the Board's General Counsel (in light of the consequences for administration of the Act and industrial practice, if dismissed charges can be resurrected at any time by the General Counsel), when the Act does not permit self-initiated charges by the Board.[14]

As in *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438, 444 (1965), where counsel for the Board articulated a rationale for the Board's order which the Board had not itself explained, this Court rejected the post hoc argument: "[f]or reviewing court's to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review." Consequently, the court of appeals was not empowered to enforce a Board decision by substitution of its rationale on the basis of cases not cited by the Board in its

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[14]The legislative history is particularly clear on Congress' intent to foreclose consideration of practices outside the six month limitations period:

> the conference agreement omits the provision of the House bill respecting the time within which a complaint must issue after a charge is filed, and retains the language of the Senate amendment that *requires that charges be filed*, and notice thereof be given, *within 6 months after the acts complained* of have taken place.

House Conf. Rep. No. 510 at 53, *reprinted in* I *Legislative History of the LMRA* at 557 (1959).

opinion and not raised by counsel for the Board on appeal. This situation happened here and is clear error.[15]

The question presented by Petitioner raises an important question under the NLRA that deserves this Court's immediate attention: to what extent may the court of appeals assist prosecuting federal agencies and contravene express statutory language and intent. Moreover, if the Board's decision is enforced, the important repose reflected in Congress' short statutory limitations period to settle labor disputes will be abrogated and once again, these questions will reappear nationwide in the Board's cases in every circuit. Resolution of this question is essential to the fair administration of the Act.

B. THE DECISION OF THE COURT OF APPEALS PLACES AN IMPROPER BURDEN OF PROOF ON THE EMPLOYER IN DISCRIMINATORY INFERENCE CASES AND REFUSES TO PLACE UPON THE BOARD THE BURDEN OF ASSERTING IN CONFORMITY WITH THIS COURT'S DECISIONS IN *WARDS COVE* AND *TRANSPORTATION MANAGEMENT CORP.*, THAT THE GENERAL COUNSEL HAS THE BURDEN TO PROVE THE EMPLOYER'S ECONOMIC REASONS WAS A PRETEXT

This case presents an expected sequel to the decision of this Court in *NLRB v. Transportation Management Corp.*, 462 U.S.

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[15]The court of appeals felt differently:

> The Board is not required to elucidate the obvious. And a case, albeit one that *the Board failed to cite in the present case either in its opinion or its brief to us*, expressly holds that *Redd-I* applies to dismissed as well as to withdrawn charges....The last link in the chain of precedent from *Ducane* to the present case has been forged. 5a (emphasis added).

393 (1983) and the Board's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980): improper burden shifting upon the employer in economic based business decisions which affect employment. In *Transportation Management Corp.*, the Court gave its approval to a decision of the Board, that affected the burden of proof in an individual employee discharge case. Hence, the General Counsel was assigned a burden to demonstrate that union animus "contributed to the employer's decision" and the employer could assert an affirmative defense only "by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union." 462 U.S. at 393-94.

1. The Board's Refusal to Follow Any Disciplined Approach to a Burden of Proof Standard in Its Cases Raises Substantial Questions Of Importance to Employers Under the Act.

The problem facing employer's nationwide, properly illustrated here, arises from the Board's fundamental theoretical precept that there is no essential "distinction between a pretext case and a dual motive case....The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense." *Wright Line*, 251 N.L.R.B. at 1084 n. 5. Consequently, the Board observed:

> Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the *sufficiency of proof* necessary for the employer's affirmative defense to be sustained.

Id.

This question presents the issue whether the burdens of proof and persuasion in employment discrimination cases are indeed different between cases arising under Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act, when this Court has interpreted the Acts similarly, and actually referred to the comparison between constitutional burdens of proof in *Transportation Management*, a NLRA case, and the NLRA burden of proof in *Wards Cove*, a Title VII case, as "a fair one." *Also Lorance v. AT & T Technologies, Inc.*, 109 S. Ct. 2261, 2267 (1989); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

In footnote 5 in *Transportation Management Corp.*, 462 U.S. at 400, the Court found the analogy to the standards of proof under Title VII in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to have been "inapposite," because Burdine was a "pretext case." *Transportation Management* was a dual motive case.

However, the Board's requirement of "proof" from the General Counsel in *Wright Line* was not explicitly one of proof in the expected sense, but was based on inference:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

251 N.L.R.B. at 1089.

It is this "inference" of action based upon union activity that calls for this Court to revisit the issue. Because the Board has discarded the distinction between pretext cases and dual motive cases and has interpreted this Court's affirmance in *Transportation Management Corp.* to conclude that any type of evidence in the record can support an "inference" which will

satisfy an unfair labor practice,[16] the Board need not apply standards of proof in individual cases as long as an inference of animus exists, regardless whether or not it arises from protected conduct.[17] It may be acceptable for the Board to use its "inferential" standard where an employer acts on the basis of job performance. It is quite another to use an inference where the act is "caused" by a business justification unrelated to employee job performance. In fact, reference to *Wright Line* has been dropped almost completely from the Board's lexicon, including

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[16]In the instant case, the ALJ found the alleged animus in the question-answer session after the employer's presentation to the employees. The speech was found uncoercive, but the answers to specific questions were found coercive. Without conceding that the statements were anything but proper under Section 8(c) of the Act, the Board has the well-documented proclivity to find animus in an employer's lawful opposition to unionization. Representative of this problem is *Holo-Krome Co. v. NLRB*, 134 L.R.R.M. 2686, 2689 (2d Cir. 1990), where the Court denied enforcement of the Board's order based on the Board finding "significant evidence demonstrating [Holo-Krome's] animus," including the fact that the Company "made known its opposition to union representation during the organizing campaign." In that case, several workers were layed off shortly after a union election based on legitimate economic reasons, and, just as in the instant case, the Board alleged unlawful employer motivation based upon its opposition to union organizing and certain alleged irregularities the employer made in recalling workers.

[17]The Second Circuit's decision in *Holo-Krome Co.*, *supra*, also found that the Board's practice of using an employer's protected speech as evidence of anti-union animus was specifically targeted for elimination by Congress in the 1947 amendments to the NLRA, H.R.Rep. No. 510, 80th Cong, 1st Sess., at 45, *reprinted in* I *Legislative History of the NLRA*, at 549:

> The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements *as evidence*, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law. The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.

any reference by the Board or the ALJ to that decision or *Transportation Management* in this case.

What this case presents to the Court is a demonstration that under the current interpretation of *Transportation Management* or *Wright Line*, the burden on the General Counsel in these cases, which is to demonstrate a decision was "in any way motivated by a desire to frustrate union activity," *Transportation Management*, 462 U.S. at 399, is such an easy "burden," that it is hard to discern that it is a burden of proof, and no court has ever found that the Board has not met the burden of proof under section 8(a)(3) because there is always some employer activity the Board can point to.

The difference between *Transportation Management* and *Wright Line* represented by the instant case, is the atypical situation not involving employee discharge or discipline, i.e., that the issue is not the usual case whether or not the worker is being disciplined by the employer for being absent or for developing a bad work record. Rather, the employer defense is a business justification based upon economic reasons.[18] When this economic defense is asserted, the *Transportation*

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[18]In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), this Court observed that there exist management economic prerogatives exempt from the duty to bargain and the Board's jurisdiction. An employer has certain "retained freedom to manage its affairs unrelated to employment," *id.* at 677, especially in "meeting business opportunities and exigencies," *id.* at 683, which exist to protect it from facing "harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation." *Id.* at 684. Accordingly, this Court concluded that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...." *Id.* at 686. The same considerations recognize a lawful business defense in the NLRA itself. The circumstances identified in *First National Maintenance* should apply even more firmly when an employer for valid economic reasons reduces its operations in the absence of a certified union, such as Petitioner did.

Management/Wright Line standard does not quite work. This is why there is no articulation of such a standard by the Board here. This is also why there must be a real analysis of the burdens on both sides of the case.

Here, the only analysis attempted by the ALJ was the substitution of his opinion as to the most efficacious manner of running the business, which is a forbidden analysis under the Act. Under the *Wright Line* approach in evaluating a business justification defense, disagreement cannot be the basis for the Board's refusal to allow its effect, but the basis would have to be clear evidence that the General Counsel has come forward with to prove the defense was not properly made or that the evidence is weak. In the instant case, the ALJ does not dispute that Sonicraft had not had inventory problems or cashflow problems previously, and a negative cashflow every day of the preceding month, 88a n.14, but his view of the employer's timing in implementing the layoff would be different.[19]

The design of the Act also shows that the government bears the burden of proof when its foundation for jurisdiction turns upon employer protected speech under Section 10(c). In *Transportation Management Corp.*, the Court found that the legislative history was silent on situations where "mixed motives" may exist for an employer act. However, the Court also plainly concluded that the "for cause" proviso to the Act "was a reaction to the Board's readiness to infer antiunion animus from the fact that the discharged person was active in the union." 462 U.S. at 401 n.6.

In fashioning an appropriate test in these cases, given recognition of the deference the Board received in *Transportation Management*, it has become far too easy for the government to meet its "burden" by simply making an assertion of union animus

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[19]The General Counsel and Petitioner agreed to a joint expert witness and accountant to review Sonicraft's economic position. That testimony was ignored by the ALJ.

claiming that the timing of a few statements had a discriminatory purpose that would forever cloud proper management action. Since the *Wright Line* test pretends that the Board "does not shift the ultimate burden" from the General Counsel to a respondent to prove an unfair labor practice, 251 N.L.R.B. at 1088 n.11, and the Board's adoption of the *Mt. Healthy* test "should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past," 251 N.L.R.B. at 1089, the "dominant motive" test abandoned in *Wright Line* highlights a mechanism which can both protect an employer's freedom to manage its business and also the General Counsel's duty to protect employees. In that test,

> it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities.

Wright Line, 251 N.L.R.B. at 1087.

The Board claimed the "dominant motive" theory was "eschewed" by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 287 (1977), a First Amendment case which held that where a government employee was denied rehire in part because of his exercise of constitutional rights and in part for permissible reasons, the employer should have been given the chance to show that it would have reached the same question in the absence of protected conduct:

> However, it is made abundantly clear in Mt. Healthy (and was specifically reiterated in Arlington Heights) that after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to

demonstrate that the decision would have been the same in the absence of protected activity.

Petitioner reiterates this combined Board test in pretext and mixed motive cases because this is the rubric the Board uses in *Wright Line* (without conceding that Petitioner had any antiunion motive). For this reason, we think that the Court's *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) and *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) analysis is useful because Title VII and the NLRA have always moved in tandem. In *Wards Cove*, 109 S. Ct. at 2126, for example, the majority explained that an employer's "burden of producing evidence of a business justification for his employment practice....should have been understood to mean an employer's production-but not persuasion-burden. *Cf., e.g., NLRB v. Transportation Management Corp.*, 262 U.S. 393, 404 n. 7, 103 S.Ct. 2469, 2475, n.7, 76 L.Ed.2d 667 (1983)." The court below rejected Petitioner's argument that if the production of business reasons in a disparate impact case under Title VII is a sufficient defense, these same reasons are also sufficient to dispel a similarly claimed inference of discriminatory intent under the NLRA. Petitioner believes this is the reason the Court in *Wards Cove* referred to *Transportation Management* in reestablishing the model for disparate impact under Title VII as not placing a burden of "persuasion" on the employer, but rather one of production of "valid reasons," that, in the circumstances of the instant case, the workers would have been layed off regardless of union activity. *Transportation Management*, 462 U.S. at 400.

The answer to this question made by the Court in the equal employment field was that the government always shouldered the burden. Now, the same burden should be placed on the government under the NLRA, because it is impossible for an employer to defend itself in a situation such as presented in this case, where even though the employer has a legitimate business justification, the employer is placed in a position of having all of the burdens (the burden to prove its business defense, the burden to dispel the "inference" of discrimination arising from the General Counsel's *prima facie* case, and the alternative burden to

disprove that the action would have been taken regardless of discrimination, i.e., the "mixed-motive" situation), and the government never articulates how the employer failed to meet the burden except for substituting its own business judgment to show the company was aware of cash shortages and inventory problems earlier, but had not yet taken such severe action (because the confluence of severe economic consequences had yet to occur).[20] So, whenever the Board states that an employer has not met its "burden," it is simply adopting the *prima facie* "inference" from review of the ALJ's treatment of the case.

2. The Same Employer Burden Carried Under Title VII to Articulate Legitimate Economic Reasons Should Apply Under the NLRA Based Upon the Commonality of Purpose Between the Two Statutes.

In requesting review of the commonality between the tests under Title VII and the NLRA, we recognize that the Board insists that its burden of proof standard has been held for many years and will argue it is a permissible construction under the Act in light of *Transportation Management*. In view of the manner in which the test has since been interpreted by the Board, the question should be reexamined, just as the Court has reexamined issues under the NLRA in *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) and *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), in determining that injunctive

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[20]Consequently, whenever an employer attempts to maintain its business and employee workforce during difficult economic periods, and the economic trigger point is finally reached, the Board will "infer" adverse intent. *See e.g., First National Maintenance*, 452 U.S. at 685, where the Court observed how an employer's management of initial economic problems, such as bargaining to reduce labor costs with a union, does not forever prevent the employer from later taking unilateral action to close a portion of its business for legitimate economic reasons. Although the Court's review was in connection with § 8(a)(5) of the Act, here Petitioner is similarly "faced with harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation," estimated at $10 million. *Id.* at 684-85.

relief was also available to remedy a breach of a collective bargaining agreement rather than just damages under § 301, 29 U.S.C. § 185.[21]

This case, then, is symptomatic of the result in *Wright Line*, where because the Board has blurred the distinction between pretext and dual motive cases in footnote 4, the Board simply views all cases as requiring the General Counsel to present some evidence of union activity and action, such as the 50 layoffs here and the union activity (discriminatory recall of four workers), and at that point shifting to the employer the heavy burden of showing business justification, which can be cast aside by the Board's "inference" of discrimination presented in the prima facie case.[22] If this is not what the Board intends, then it should be required to articulate why the business proof presented by Petitioner was not true. Of course, in *Transportation Management*, the Court did not approve of the Board's abandonment of the distinction between dual motive and pretext cases; the Court did recognize that the differences were apparent in its reference to *Burdine*, but inapplicable to the case. 462 U.S. at 400 n.5.

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[21]Member Jenkins in his concurring opinion in *Wright Line*, 251 N.L.R.B. at 1091, recognized that there was an inherent problem with the standard being adopted in that case, and he was open to reexamining the issue in the future: "This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause....*If experience shows it to be inadequate in application, modification may be required.*" (Emphasis added).

[22]In the instant case, the General Counsel identified no such business factor asserted by Petitioner that was improper. Since it is unlikely that in these situations a "smoking gun" will exist, the Board will always make its decision based upon an inference of discrimination. This inferential basis of decision, is akin to the disparate impact test under Title VII, where the allegation of a decision based upon union activity is much like a statistical case of race or sex discrimination.

When the Board is dealing with economic defenses unrelated to job performance, a different test is necessary in the Labor Act, just as this Court determined necessary under Title VII. *Transportation Management* was a garden variety § 8(a)(3) case dealing with a discharge based upon alleged unsatisfactory job performance and *Wright Line* also dealt with a single employee and his job performance; but those discrete situations are totally different from situations where outside economic forces drive management decisionmaking. This latter situation should require a different balance of proof. The burden of proof should be articulated and it should be the *Ward's Cove* burden that the General Counsel must come forward with a specific motivating causal factor and prove the alleged discriminatory factor, rather than just being able to take a broad brush approach and require the employer to attempt to dispel all reasons.

Given the fact that the Board has total leeway in presenting its prima facie case, a fair responsibility would be for the General Counsel to bear the burden on the backside of the case. The employer, therefore, should only have the burden of coming forward with the business defense, and once it has presented its evidence, the General Counsel must show that the defense is pretextually false. This burden should be struck in this case, as to the second class of cases recognized by the Court in footnote 5 in *Transportation Management*, *viz.*, pretext cases, but not considered at that time.

In the case at bar, the Administrative Law Judge, the Board, and the Seventh Circuit failed to explain why the financial reason produced by Petitioner was not a real economic and non-discriminatory basis for Petitioner's action at the time of the "mass" layoff. In Petitioner's view, we met the burden of proof under either *Transportation Management* or *McDonnell Douglas*, but neither test was applied.[23]

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[23]This case represents the Board adjusting its decisions to the prevailing winds. There is no explanation of any evidentiary burden of proof, or its basis in the statute, by either the Board or the ALJ to the parties in this case. The

Moreover, *Transportation Management* did not prescribe what showing of illegal motivation the General Counsel must make in order to shift the burden to the employer. According to the Board's *Wright Line* doctrine, 251 N.L.R.B. at 1089, the General Counsel must simply make a showing "sufficient to support the inference" that protected activity was a motivating factor. In recent opinions, this Court has rejected this position.

First, in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the Court revisited the dual motive/burden shifting question in the context of Title VII and explained its analysis in *Transportation Management*. According to the plurality opinion, *Transportation Management* stands only for the proposition that once the General Counsel proves "[t]he employer is a wrongdoer," then "[i]t is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not be innocent activity but by his own wrongdoing." *Price Waterhouse*, 109 S. Ct. at 1790, *quoting Transportation Management*, 462 U.S. at 403.

According to Justice O'Connor (concurring), "the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation" is only justified where there is "direct evidence that an illegal criterion was a substantial factor in the decision." Id. at 1796. Only where the General Counsel had made "this type of strong showing of illicit motivation" is the fact finder "entitled to presume that the employer's discriminatory animus made a difference to the outcome." Id. Consequently, the "strong medicine" of a shifting burden is only permitted where there is a "strong showing" by "direct evidence" that illegal discrimination was "a substantial or motivating factor."

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real question presented here, is what the applicable standard is, an answer the Board will continue to refuse to provide so long as the courts of appeal are willing to enforce Board decisions without any such explanation of the proper standard.

While *Price Waterhouse* arose in the Title VII context, this is no reason to doubt that the appropriate analysis of dual motive/burden shifting cases under Title VII should be identical to that under the NLRA. First, both *Transportation Management* and *Price Waterhouse* borrowed their rationale from *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274 (1977), a First Amendment case. Thus, both *Transportation Management* and *Price Waterhouse* depend for their analysis upon a case which did not ease the plaintiff's burden of proving illegal motivation but which recognized an affirmative defense for the employer where the plaintiff had made a strong showing of illegal motivation. The Sixth Circuit in *Gagne v. Northwestern National Ins. Co.*, 881 F.2d 309 (6th Cir. 1989), a Title VII case, has interpreted the *Price Waterhouse* decision of this Court as follows:

> [T]he *Price Waterhouse* Court specifically admonished that the new standard would apply only in the limited circumstances where the employee produced direct evidence that the adverse employment decision at issue was the result of "mixed motives" on the part of the employer and that, although the employer acted in part because of legitimate, non-discriminatory justifications, an impermissible discriminatory animus was a substantial motivation for its action.

Id. at 315.[24]

Furthermore, in consideration of the reasoning in *Wards Cove*, 109 S. Ct. at 2126 (1989), this Court has yet to resolve the question whether the Board's proper burden of proof under the Act is to disprove by pretextual evidence, under the similar rule

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[24]Petitioner is aware of another case which is pending that might ultimately address the same burden shifting question presented in the instant case: *Hyatt Corp. v. NLRB*, Nos. 89-6407, 90-5697 (6th Cir.). More cases are expected to arise as the Board refuses to follow this Court's burden shifting analysis.

in disparate-treatment cases where intent must be proven, the employer's "assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." The Seventh Circuit absolutely refused to consider the merits of this business defense advanced by Petitioner. Consequently, the Seventh Circuit's opinion is silent on this important point which should have been part of its "substantial evidence" review of the Board's decision under § 10(f), 29 U.S.C. § 160(f), of the Act.

Under the "for cause" limitation of the Act itself, which prohibits a finding of an unfair labor practice, 29 U.S.C. § 160(c), the Board and the Circuit Court should not reject the employer's legitimate business defense without an explanation,[25] the absence of which occurred in the instant case. This Court has also previously explained in employment cases that the federal court's and agencies may not substitute their views for the business decisions of employers: "In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress *they should not attempt it.*' *Furnco Construction Corp. v. Waters*, 438 U.S., at 578, 98 S.Ct., at 2950." *Wards Cove*, 109 S. Ct. at 2127, (quoting *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2791 (1988)(emphasis added)). Consequently, this issue stands properly poised on this record.

Neither the Seventh Circuit nor the Board articulated why petitioner's defense of its management decisions, by the production of nondiscriminatory economic reasons for the lay-off, was

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[25] In *Wright Line*, 251 N.L.R.B. at 1088 n.11, the Board also recognized that not all acts of an employer are inherently destructive of employee rights, such as an employee's discharge.

not legitimate economic evidence.[26] All the evidence was unrebutted. The Seventh Circuit simply remarked, "[t]he company had the burden of persuasion, and failed to carry it." 7a. The ALJ stated Sonicraft had "fail[ed] to overcome the General Counsel's showing of discriminatory motivation," 93a, a responsibility an employer has no responsibility to rebut.[27]

The Board's footnote opinion completely refused to address Petitioner's business defense that the confluence of real negative cashflow and inventory problems caused it to implement the lay off. The ALJ, in turn, did not find that Sonicraft's negative cash flow position "almost continuously from June 1980 through December 1981," was not a truthful basis for the layoff decision. 90a. Sonicraft's articulation of its defense should have been sufficient. *See Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 1989)("after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not

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[26]The ALJ opined that "[t]he evidence does not show a severe problem either in inventory or in cash flow that would justify such a precipitous and far reaching layoff." 93a. Clearly, the ALJ did not claim there was no cashflow or inventory problem, but in his opinion, it was not severe enough. That call was for management to make, not the government substituting its own post hoc value judgment, or refuting management's view of the tension under which the decision arose, even if erroneous. Cf. 91a (the statement that "Jones' testimony ...is thus refuted by the documentary evidence.") with Tr. at 1584 (ALJ not permitting company president to relate his opinion of the demeanor of the company treasurer's statements to him to show financial crisis: "The crisis or the urgency would be hard evidence. Sustained.").

[27]Section 10(c) of the Act expressly requires that violations be proved by a "preponderance of the evidence." *Transportation Management*, 113 L.R.R.M. at 2860. "The Board's allocation of the burden of proof is clearly reasonable in this context." *Id.* at 2861. However, in *Price Waterhouse*, 109 S. Ct. at 1794, Justice Brennen's opinion explains that in the partnership committee process, there was no "direct evidence" that the discriminatory motive "had played a role in the decision." Hence, even under the mixed-motive model, the burden shifting does not occur without direct evidence of discrimination, of which there is none in the case at bar.

shift to the employer to show that its stated legitimate reason was the true reason."[28]

It would be inconceivable that if Title VII was patterned after the NLRA, as this Court has repeatedly stated, that the manner in which the employer presents its independent business reasons as its defense, will be different under each statute. This difference, if it is permitted to continue, will create terrible uncertainty in an employer's presentation of its "affirmative defense" in all areas of employment law. Furthermore, it is inconceivable that the majority in *Wards Cove* and *Price Waterhouse*, by citing to *Transportation Management*, could have been referring to anything but that prior "cases" always left the ultimate burden of proof on the Plaintiff or General Counsel to demonstrate pretext, and the Court was empowered by law to so place the burden on the parties.

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[28] *Price Waterhouse*, 109 S. Ct. at 1796, White, J.; concurring, explained,

> In a mixed motive case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, *this should be ample proof*. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court grant a writ of certiorari to the Seventh Circuit to review these important questions central to the administration of the National Labor Relations Act.

Respectfully submitted,

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September 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SONICRAFT, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL & PROFESSIONAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervening Respondent.

Nos. 89-2458, 89-2694

May 9, 1990, Argued
June 12, 1990, Decided

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before: POSNER and FLAUM, Circuit Judges, and Will, Senior District Judge.[1]

POSNER, Circuit Judge. The Labor Board asks us to enforce, and the Sonicraft corporation asks us to set aside, an order by the Board (295 N.L.R.B. No. 67 (June 15, 1989)) finding that Sonicraft violated the National Labor Relations Act by threatening economic retaliation against its workers during a representation election campaign and by carrying out the threat after the union (despite the company's threats) won the election. The retaliation operated as follows. The company laid off 50 of the 92 employees in the bargaining unit just two days after the election, and quickly began recalling all but those employees who had been vocal supporters of the union -- the latter being placed

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[1] Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

on a "no-no list" and either never recalled or recalled later than they would have been but for their support of the union.

The principal issue is the statute of limitations. The Act provides, in section 10(b), that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." 29 U.S.C. § 160(b). The election campaign, the election, and the layoffs took place in 1981. Early in 1982, within the six months permitted by the statute, the union filed with the Board a charge encompassing all the allegations later included in the complaint issued by the Board's General Counsel. On April 29, the Regional Director (a subordinate official in the General Counsel's office) dismissed the charge insofar as it alleged that the layoff had been unlawful and issued a complaint limited to pre-election intimidation and to the sequence in which certain employees had been recalled after the layoffs that followed the election. The union appealed the dismissal of the layoff portion of the charge to the General Counsel, the final authority for the issuance of complaints by the Board, but without success. However, additional evidence coming to light, on December 1 the General Counsel moved the administrative law judge presiding over the case for permission to file an amended complaint restoring the allegations about the layoff, and after an appeal to the Board the amendment was allowed and the amended complaint was issued on January 20, 1983. The General Counsel's motion had come almost a year after the layoff had taken place and more than six months after the selective recalls: too late, according to Sonicraft. The Board disagreed, ruling in the decision under review that because the restored allegations were closely related to the allegations that had been retained, section 10(b) did not bar the amendment.

In addition to establishing a period of limitations, section 10(b) authorizes the Board to amend a complaint at any time before entering its final order. There is nothing here or elsewhere in the Board's statutes or rules about relation back; but the usual rule, codified for example in Rule 15(c) of the Federal Rules of Civil Procedure, is that, for purposes of determining whether the

statute of limitations has run, an amendment to a complaint relates back to the original complaint if it arises out of the dispute that gave rise to the original complaint. Displaying its usual preference for common law over express rulemaking, the Board has long had a doctrine, parallel to that of Rule 15(c), that an amendment which is "closely related" to the original charge relates back to the date of the original complaint. *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 732-33 (7th Cir. 1983) (per curiam); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). The allegations in this case concerning the layoffs are closely related to the allegations of discriminatory recall; the recalls began only four days after the layoffs, and the layoffs and the recalls were the one-two punch in the company's scheme of retaliation. The company points out, however, that in *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1391 (1985), enforced without opinion, 785 F.2d 304 (4th Cir. 1986), a three-member panel of the Board ruled that a dismissed or withdrawn charge "ceases to exist" and therefore cannot be revived outside the six-month limitations period unless the respondent is guilty of fraudulent concealment; the Board, however, declined in this case to rule that Soniccraft had been guilty of that. One of the panel members in *Ducane* found it unnecessary to decide whether the reinstatement of one of the dismissed charges might be supportable under the "closely related" doctrine, id. at 1391 n. 9; the other two members did not mention the issue.

If *Ducane* stood alone, we would have the unfortunate, and unfortunately not uncommon, situation in which the Board limits or even repudiates a precedent in silence. For in deciding that the layoff charges were not time-barred in this case, the Board did not attempt to distinguish Ducane. And although one member of the panel in Ducane had thought it unnecessary to decide whether the closely-related doctrine might permit the General Counsel to reinstate a dismissed charge, the majority opinion (which is to say all but note 9) did not respond to the suggestion and could be thought, by the sweeping language it employed, to have confined the closely-related doctrine to cases

in which the belated amendment adds an allegation not previously dismissed or withdrawn.

But *Ducane* does not stand alone. In *Redd-I Inc.*, 290 N.L.R.B. No. 140, 129 L.R.R.M. 1229, 1231 (1988), the Board limited *Ducane* to "an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge." Sonicraft argues that this is not a reasoned distinction, because dead is dead; and it adds that *Redd-I* involved withdrawn rather than, as in both this case and *Ducane*, dismissed allegations. Our view is different. Apart from footnote 9, *Ducane* makes no reference to the closely-related doctrine; and an administrative agency, unlike a court, is not permitted to over-rule its doctrines in silence -- it must explain itself. *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 48, 57 (1983); *Wilkins v. Sullivan*, 889 F.2d 135, 141 (7th Cir. 1989); *International Union, UAW v. NLRB*, 802 F.2d 969, 974 (7th Cir. 1986); *Local 1384, UAW v. NLRB*, 756 F.2d 482, 492 (7th Cir. 1985); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093-94 (7th Cir. 1984); *Lynch v. Dawson*, 820 F.2d 1014, 1021 (9th Cir. 1987). (This of course is the heart of Sonicraft's argument.) The presumption is therefore that the closely-related doctrine survived *Ducane*, and *Redd-I* makes this explicit. The distinction between related and unrelated allegations makes perfectly good sense and does not violate the principle, urged by Sonicraft, of the finality of death. A dismissed allegation stays dead, all right, but the complaint is not confined within the boundaries of the original charge.

It is true that in this case the complaint was amended after the hearing (that is, the trial) before the administrative law judge began. So belated an amendment could violate a respondent's right to a fair hearing. But the issue in this case is not procedural fairness. Sonicraft does not argue that the last-minute amendment of the complaint impaired its ability to defend itself; and there is no general rule cutting off the time for amending a complaint. Compare Fed. R. Civ. P. 15(b), which permits an amendment that conforms the complaint to the evidence to be made even after

judgment. Sonicraft argues, rather, that the amendment was barred by the statute of limitations -- and would have been even if made months earlier. We reject the argument. If the allegations concerning the motive for the layoffs had not been included in the union's charge, the complaint could have been amended on December 1, 1982, to add them, without running afoul of section 10(b); as we said, they grow out of the same retaliatory scheme, which had two stages -- layoff, followed by selective recall. The only possible significance of the dismissal of a closely related charge is that it might lull a respondent into thinking he didn't have to worry any longer about defending himself against that charge. But this possibility depends on the rule; after *Redd-I* it is plain that he does still have to worry, provided the dismissed allegations are closely related to the remaining ones. The trial began on October 6, 1982, long before the decision in *Redd-I*, or for that matter in *Ducane*. (The delays in this proceeding have been appalling.) But Sonicraft does not argue that the belated amendment of the complaint impeded its defense, or prejudiced it in any other way.

Redd-I involved a withdrawn charge; this case, like *Ducane*, Involves a dismissed one. The Board applied *Redd-I* in the present case without remarking this difference. Is *this*, perhaps, an example of the Board's changing course without explanation? It is not. The only conceivable difference between withdrawal and dismissal is that the latter action might have a greater lulling effect, since reinstatement would require the General Counsel to change his mind. But Sonicraft does not argue lull. The Board is not required to elucidate the obvious. And a case, albeit one that the Board failed to cite in the present case either in its opinion or in its brief to us, expressly holds that *Redd-I* applies to dismissed as well as to withdrawn charges. *Stern Entertainment System Inc.*, 290 N.L.R.B. No. 167, 130 L.R.R.M. 1147, 1149 n. 3 (Sept. 23, 1988). See also *Columbia Textile Services Inc.*, 293 N.L.R.B. No. 127, 131 L.R.R.M. 1241, 1242 (May 15, 1989). The last link in the chain of precedent from *Ducane* to the present case has been forged.

The merits of Sonicraft's challenge to the Board's order require little discussion. Sonicraft attacks the findings of the administrative law judge with great vigor and pertinacity, but the evidence that the layoffs and selective recalls were motivated by hostility to the union and its supporters is overwhelming and also supports the inference of intimidation that the administrative law judge drew from campaign statements that in another setting might be thought within the bounds of lawful campaign rhetoric. This was a straightforward case; it is a pity that it has taken eight years to resolve.

We reject, finally, Sonicraft's contention that *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), abrogates the Labor Board's long-standing rule, endorsed in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that once the General Counsel shows that hostility to unionization was a factor in a layoff, the company has the burden of persuading the Board that the layoff would have occurred anyway. The issue in *Wards Cove* was the burden of persuasion in disparate-impact cases under Title VII of the Civil Rights Act of 1964 - precisely cases in which discriminatory animus is not shown, making questionable the doctrine, repudiated by that decision, that once an innocent practice is shown to burden a protected group disproportionately, the burden of persuasion shifts to the employer to show that the practice is necessary to his business. If analogies to the present case are to be sought in civil rights law, the closest will be found in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989), which holds that in a mixed-motive case the burden of negating causation is on the employer. In fact that is the same rule as the rule of *Transportation Management*, cited approvingly in *Hopkins*, 109 S. Ct. at 1788; and as no one suggests that *Wards Cove* overruled *Price Waterhouse*, we may assume that *Transportation Management* survives *Wards Cove* as well.

It is true that *Wards Cove* cites *Transportation Management* for the proposition that certain civil rights cases that might have appeared to shift the burden of persuasion to the employer really had meant only to shift the burden of production to him, leaving

the burden of persuasion on the plaintiff, the employee, corresponding to the General Counsel of the Labor Board in the present case. 109 S. Ct. at 2126. But the Court seems to have been referring to a fine-spun distinction in *Transportation Management*, found also in *Price Waterhouse*, rather than repudiating either decision. *Transportation Management* explains that the burden of proving the employer's hostility to the union never shifts, but that even if the General Counsel carries that burden the employer can defend by showing that the discharge or layoff would have taken place anyway, for noninvidious reasons. In other words, the employer has an affirmative defense (no causation), as to which of course he bears the burden of persuasion, but so far as the main case is concerned the burden of persuasion never shifts. And it is, we think, this constancy of the burden of persuasion in the plaintiff's case that the Court in *Wards Cove* was pointing to by its "cf. e.g." reference to *Transportation Management*. We do not think that the reference was intended to revolutionize labor law. Once the General Counsel in our case demonstrated the company's hostility to the union's attempt to organize its workers, the company could defend only by showing that it would have made the layoffs anyway. This was an affirmative defense. The company had the burden of persuasion, and failed to carry it.

Sonicraft raises other issues, but they are singularly without merit and it is merciful to pass over them in silence. The Board's order will be

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDGMENT - WITH ORAL ARGUMENT

DATE: June 12, 1990

Before: Honorable Richard A. Posner, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Hubert L. Will, Senior District Judge[1]

No. 89-2458, 89-2694

SONICRAFT, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL & PROFESSIONAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS,
Intervening Respondent.

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

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[1]Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

This cause was heard on the record from the above mentioned National Labor Relations Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the decision of the National Labor Relations Board be, and the same is hereby, ENFORCED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SONICRAFT, INC.

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL & PROFESSIONAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Case 13-CA-22020

June 15, 1989; Amended February 28, 1984

SUPPLEMENTAL DECISION AND ORDER

By Wilford W. Johansen, Member; Dennis M. Devaney, Member; James M. Stephens, Chairman

OPINION: On February 14, 1984, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed a brief supporting the judge's decision.

On March 27, 1985, the Board remanded the case to Judge Giannasi to address the propriety of an amendment to the complaint relating to December 1981 employee layoffs and subsequent recalls in light of *Ducane Heating Corp.*, 237 NLRB 1389 (1985), a decision that had issued after Judge Giannasi's decision.

On December 11, 1985, Judge Giannasi issued the attached Supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[2] and conclusions,[3] to modify the remedy,[4] and

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[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3]In the absence of exceptions, we adopt pro forma the judge's findings that the Respondent did not violate Sec. 8(a)(1) by Supervisor Rufus Denson's questioning employee Oliver Harper on the day of the representation election about how he was going to vote and by Company President Jerry Jones' references to layoffs during his November 25 address to assembled employees. We note that any violations found regarding either incident would be cumulative and not affect the remedy or the Order.

As the parties have had the opportunity to brief the 10(b) issues of this case fully before Judge Giannasi and before the Board, we deny the Respondent's August 10, 1984 motion to strike portions of the General Counsel's and the Union's briefs addressing these issues and, in the alternative, for leave to file a reply brief.

As to the judge's analysis of the 10(b) issue in his supplemental decision, we find, in agreement with the judge, that the discriminatory mass layoff, the selections for layoff, and certain refusals of selection for recall from layoff are "closely related" to the outstanding timely filed charge. See *Redd-I, Inc.*, 290 NLRB No. 140 (Sept. 16, 1988). In his dissent, Chairman Stephens agrees that the allegations raised the timely filed charge and allegations of the complaint amendment are all closely related. The dissent relies, however, on procedural due process and fairness concerns in concluding that the complaint prior to amendment did not put the Respondent on notice that it would have to defend against mass layoff, layoff selection, and recall selection allegations because the latter groups of allegations had been set forth in the original charge but had been dismissed prior to hearing. As stated in *Redd-I*, it is the function not of the charge but of the complaint to give notice to a respondent of specific claims made against it. See *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959); see also *NLRB v. Atlas Linen Supply*, 322 F.2d 216, 219 (6th Cir. 1963), cert. denied 376 U.S. 951 (1964) ("a complaint may be amended to conform to proof adduced on the hearing"). In the absence of a showing of surprise that would

to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sonicraft, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN STEPHENS, dissenting in part.

In accordance with the views expressed in my dissenting opinions in *Redd-I, Inc.*, 290 NLRB No. 140 (Sept. 16, 1988), and *Kanakis Co.*, 293 NLRB No. 50 (Mar. 29, 1989), I would find the complaint allegations regarding the December 1981 employee layoffs and subsequent failures to recall to be barred by Section 10(b) of the Act except for the allegations concerning discriminatory failures to recall four individuals named in the original complaint.[1] Even though the complaint allegations regarding the layoffs and large group of subsequent recalls may be "closely related" to the allegations raised in the timely filed charge, the sequence of charge filings and withdrawals here is such that the Respondent would not reasonably have believed at the expiration

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have hampered presentation of the Respondent's defense at hearing after the complaint was amended, we find that the Respondent has suffered no denial of due process. See *Redd-I*, supra, slip op. at 6-7. As we reject the 10(b) defense based on the judge's findings, consistent with the Board's analysis in *Redd-I*, that the allegations in the complaint amendment are closely related to the content of the original charge, we find it unnecessary to reach the fraudulent concealment issue on which the judge alternatively based his rejection of the 10(b) defense.

[4]Interest will be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987).

[1]In all other respects I join my colleagues in affirming the judge and adopting his recommended Order.

of the 10(b) period that it might have to litigate allegations pertaining to the December 1981 discharges and subsequent refusals to recall, except for the four referred to above.

The original charge, filed February 22, 1982, alleged that the Respondent violated the Act by laying off employees and thereafter refusing to recall employees for discriminatory reasons. On April 29, 1982, the Regional Director sent a letter to the Union stating that he was refusing to issue a complaint on that aspect of the charge that alleged that the original layoff was unlawful but that the "dismissal is not intended to affect . . . allegations concerning [Respondent's] failure to recall certain employees which are alleged in the complaint." The complaint, which issued the same day, contained several 8(a)(1) and (3) violations concerning the refusal to recall or reinstate employees Armstrong, Barlow, Lynch, and Sherron. Thus, when the 10(b) period had run in June 1982, the Respondent knew that the Regional Director had considered, and rejected, claims that the Respondent had unlawfully laid off employees in December 1981 and subsequently refused to recall them as a group and the Respondent would not reasonably have contemplated litigating those matters.

I also disagree with the judge's finding that the Respondent fraudulently concealed operative facts underlying the alleged violation that would warrant reinstatement of the original charge allegations outside the 6-month limitations period of Section 10(b). As stated in my dissenting opinion in *Kanakis*, there may be cases in which the General Counsel should be allowed to toll Section 10(b) where fraud is perpetrated against his or her office; however, this is not such a case. Here, following a timely charge alleging a mass layoff and subsequent refusal to recall employees, the Regional Office commenced an investigation of the allegations. From the start, the Regional Office was aware of the operative facts concerning the alleged violation -- that there was a mass layoff on the heels of a union victory in a certification election. Furthermore, during the investigation, the Regional Office interviewed various employees witnesses who stated that

Respondent's president had threatened to lay off employees if the union was voted in. Although the Regional Office sought, as part of its investigation, to obtain a series of tape recordings of question-and-answer sessions between the Respondent's president and its employees that, when played during the course of the trial, confirmed that the Respondent did indeed unlawfully threaten to layoff employees, the Respondent did not turn them over during the investigation, asserting that the tapes were "indecipherable." Based on its investigation, the Regional Office decided not to prosecute the mass layoff and subsequent refusal to recall allegations of the complaint.

The General Counsel now asserts, and the judge found, that the Respondent's failure to turn over the tape recordings of the question-and-answer sessions constitutes fraudulent concealment warranting the reinstatement of the original charge allegations outside the 6-month limitations period of Section 10(b). Because the Regional Director was aware of all the operative facts underlying the alleged violations when he opted, within his statutory discretion, not to prosecute that aspect of the case concerning the mass layoff and subsequent refusals to recall employees to work,[2] I do not believe that there has been any fraudulent concealment from the General Counsel that would warrant equitable relief from Section 10(b).

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[2]It is also noteworthy that the Respondent's inaccurate statement about the clarity of the tape recording in no way contradicted the testimonial evidence supporting the charge.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SONICRAFT, INCORPORATED

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL & PROFESSIONAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Case 13-CA-22020

SUPPLEMENTAL DECISION

(Decision After Remand)

ROBERT A. GIANNASI, Administrative Law Judge: My original decision in this case issued on 14 February 1984. I found that Respondent violated Section 8(a)(1) of the Act by making various statements and threats and Section 8(a)(3) and (1) of the Act by virtue of its mass layoff of some 50 employees in December of 1981 for discriminatory reasons. Alternatively, I found that Respondent discriminatorily selected 8 employees for layoff and discriminatorily refused to recall 10 employees in a timely manner. I also rejected Respondent's contention that Section 10(b) of the Act precluded litigation of an amendment to the Complaint concerning conduct which was the subject of a charge partially dismissed by the General Counsel and which occurred more than 6 months before the amendment. The original charge alleged as unlawful the layoffs and the refusal to recall the laid-off employees, as well as a number of Section 8(a)(1) allegations and "other acts." The General Counsel issued Complaint on four of the refusals to recall and certain Section 8(a)(1) violations, and dismissed the mass layoff allegation. Citing new evidence, the General Counsel thereafter granted the charging party's request

for reconsideration, revoked his partial dismissal and sought to amend the Complaint to include the allegations which had earlier been dismissed. My rejection of the Respondent's Section 10(b) argument was compelled by interim orders of the Board in this case, which not only permitted, but required, litigation of the Complaint amendment. See my original decision at pp. 3-7 for a full exposition of the procedural history of the case.

On 11 January 1985, the Board issued its decision in *Ducane Heating Corporation*, 273 NLRB No. 175, in which it overruled *California Pacific Signs, Inc.*, 223 NLRB 450 (1977) and *Winer Motors, Inc.*, 285 NLRB 1457 (1982), two cases the Board presumably relied upon when it decided that the amendment in this case was proper. On 27 March 1985, the Board remanded the instant case to me "for the limited purpose of addressing the Section 10(b) issues relating to the complaint amendment pertaining to the December 1981 employee layoffs in question in light of *Ducane Heating*." By July 1985 I had received briefs from all parties and reply briefs from the General Counsel and the Respondent. Based on those briefs, an analysis of the applicable authorities, and a reconsideration of the relevant evidence, including the demeanor and credibility of the witnesses, I make the following findings and conclusions.

Before *Ducane Heating*, Board law clearly permitted an amendment to a Complaint based on charges that had earlier been dismissed by the General Counsel, so long as the original charges had been timely filed and the General Counsel discovered new evidence concerning the dismissed charge. See *California Pacific Signs, Inc., supra*. In this case, the then General Counsel set aside his partial dismissal because, during the trial, the discovery of new witnesses and consideration of material obtained by subpoena justified granting charging party's request for reconsideration of the earlier decision not to litigate the layoff issue. Respondent argued that since the General Counsel had dismissed the allegation that the December 1981 layoffs were unlawful, that part of the charge was extinguished and, since no charge involving the layoffs existed, the December 1982 amendment was barred by

Section 10(b). That view was rejected by the Board twice in this case. See also *Mourning v. NLRB*, 505 F.2d 421, 424 (C.A.D.C., 1974)(the 6-month limitations period of Section 10(b) runs against a charging party, not the General Counsel); and *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (C.A. 7, 1983) ("The six month limitation period applies only to the filing and service of a charge and not to the issuance or amending of a complaint," citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959)).

In *Ducane Heating*, the Board held that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." (slip op. p. 6).[1]

A. The Fraudulent Concealment Issue

The General Counsel and the Union allege that there was fraudulent concealment in this case sufficient to provide an exception to the *Ducane Heating* rule because (1) During the investigation of this case, Respondent declined to provide tape recordings of question-and-answer sessions between President Jerry Jones and employees and represented that the tapes were "undecipherable." When the tapes were later provided pursuant to subpoena, one of them -- that relating to the 25 November session -- was clearly audible and provided evidence of unlawful

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[1] In *Ducane Heating*, the Board did not discuss the principles in the Mourning or Complas cases or whether the new rule was to be applied retroactively. Normally, the extinguishment of a cause of action by a new interpretation of a statute of limitations warrants a careful analysis of retroactive or prospective application. See *Chevron Oil v. Huson*, 404 U.S. 97, 106 (1971); *Landahl v. PPG Industries, Inc.*, 746 F.2d 1312, 1314-1316 (C.A. 7, 1984); *Gray v. OPM*, No. 84-5052, August 19, 1985, C.A.D.C., slip op. pp. 16-17. I do not view the remand order as permitting a discussion of these issues here.

conduct and motive; and (2) Respondent's 29 March 1982 position statement submitted to the Regional Office during the investigation contained material that later proved incorrect and incomplete.[2]

Initially, I must say that I have difficulty in determining what the Board means by fraudulent concealment in this context. In *Ducane* the Board stated "the limitations period begins to run when the charging party knows or should have known of the concealed facts." However, both in this case and in *Ducane*, the charging party filed a timely charge. The operative facts in this case - that a mass layoff had occurred -- were clearly known by the charging party at the time it filed the charge. The General Counsel decided not to litigate the mass layoff issue based on his initial investigation. *Ducane* holds that, even though a charging party has filed a timely charge, the General Counsel cannot revive a dismissed charge after the Section 10(b) period has run. The thrust of the Board's holding in *Ducane* is that the General Counsel's action or inaction caused the limitations period to run. I therefore assume that *Ducane* refers to fraudulently concealed facts which, if not concealed, might have caused the General Counsel initially not to dismiss the charge.[3]

Respondent argues that what is relevant in determining fraudulent concealment is the knowledge of the "adversely affected" party, here the charging party, and not the General Counsel, citing numerous authorities. See e.g. *Wisconsin River Valley, District Council (Skippy Enterprises, Inc.)*, 211 NLRB 222, 226 (1974). Since, in *Ducane*, the Board first applied the Section 10(b) limitations period to the General Counsel, it is not

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[2]The Respondent actually submitted several position statements but the one upon which the General Counsel focuses was that of 29 March 1982. (See G.C. Exh. 4, 4(b) and Resp. Exh. 65.)

[3]Respondent is presently represented by different counsel from counsel who represented it during the investigation and trial.

surprising that the prior authorities would speak of fraudulent concealment in terms of the charging party's knowledge. And since, in *Ducane*, the charging party had filed a timely charge, when it spoke of fraudulent concealment, the Board must have referred to the knowledge of the General Counsel. See also *Winer Motors, supra*, 265 NLRB at 1458 n. 12 and accompanying text, where the Board defined fraudulent concealment as conduct which causes the charging party either to withdraw a timely filed charge or not to file one at all.

Thus, although, in *Ducane*, the Board spoke in terms of fraudulent concealment, it appears more likely that the Board meant to address the issue of misrepresentation by a respondent during the General Counsel's investigation. I am unsure of the exact contours of the so-called fraudulent concealment or misrepresentation exception when the charging party has filed a timely charge and the statute of limitations is applied to the General Counsel. Its definition is essentially a matter for the Board. However, I believe it is appropriate in this case to apply at least some of the criteria that are applied in fraudulent concealment cases which toll the statute of limitations for the charging party. Thus, the evidence allegedly concealed by misrepresentation must not only be material but must not have been discoverable by the exercise of due diligence. See, *ILGW v. NLRB (McGloughlin Mfg. Corp.)*, 463 F.2d 907, 921-923 (1972); *Amcar Div., ACF Industries, Inc., v. NLRB*, 592 F.2d 422, 429-431 (C.A. 8, 1979); *NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 382-384 (C.A. 9, 1979). See also, *Duff-Norton Co.*, 275 NLRB No. 93 (1985) and *Northwest Towboat Ass'n*, 275 NLRB No. 24, (1985)(slip op. p. 4).[4]

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[4]The fraudulent concealment exception is, of course, an equitable doctrine read into all federal statutes of limitations. As the Supreme Court has stated:

> Where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the

Turning first to the alleged misrepresentation relating to the tape recordings, I note that the record shows that President Jerry Jones made three speeches to assembled employees. Texts of Jones' prepared remarks were turned over to the General Counsel during the investigation. However, on two of these occasions, there were discrete question-and-answer periods after the speech. The meetings were taped by the Respondent. When the tape recording of the 25 November meeting was produced pursuant to subpoena during the hearing in this case, the General Counsel was able for the first time to listen to the tapes. He concluded that Jones' remarks were unlawful and bore on the motive for the 11 December layoffs. He then sought to amend the complaint to add Section 8(a)(1) allegations and the mass layoff allegations initially dismissed. I found that Jones did indeed make two unlawful threats of retaliation, including one that the employees might be sent home or laid off (see my decision at pp. 19-20 and 21). These threats demonstrated unlawful motive for the layoffs.

The General Counsel alleges that the Respondent made serious misrepresentations about the tapes during the investigation. In analyzing this issue, I accept the testimony of Board agent Edward Klaeren that, during the investigation, Respondent's agents refused his request for the tapes and told him, falsely, that the tapes were not understandable. Klaeren testified that he asked Respondent's Attorney Bettye Kitch and President Jerry Jones for the tapes of Jones' remarks to employees at group meetings. Actually, only two of the meetings were taped. Kitch first said she would "consider" the request, but then told Klaeren that the tapes could "not be deciphered" and that she would try to get an expert to decipher them. Kitch also said she had

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party committing the fraud to conceal it from the knowledge of the other party."

Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946), quoting from *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1894).

listened to the tapes and "all she could hear were telephones ringing in the background" and that parts had been "taped over." Klaeren testified that he never was offered the tapes and never heard them. Kitch and Jones testified that Klaeren was offered the tapes and actually listened to portions of both of them. Kitch testified that "all of us decided it was very difficult to understand."

I credit Klaeren's testimony. I found him to be the more candid and credible witness and his testimony survived vigorous cross-examination. I had earlier found Jones not to be a reliable witness on other very significant matters in this case. (See my original decision at pp. 25-31 and p. 18 n. 10.) I found him no more reliable when testifying about this issue. And Kitch appeared to me to be tailoring her testimony to fit her litigation theory. The testimony from Respondent's agents that the tape was not understandable also flies in the face of reality. I listened to the 25 November tape and, except for a few words and a taped over segment, Jones' remarks were clearly understandable. Indeed, the parties were able to agree to a transcription which was received in evidence as G.C. Exh. 3. I find it implausible that an experienced field examiner like Klaeren, if he had heard any part of the 25 November tape, would have agreed with Jones and Kitch that it was "very difficult to understand." Nor do I believe that Klaeren would have listened to only a portion of the 25 November tape, as Kitch and Jones testified. It seems more likely that, if given the opportunity, he would have listened to all or a substantial portion of it and, in so doing, he undoubtedly would have concluded that the tape was understandable.

In addition to falsely representing that the 25 November tape was undecipherable, the Respondent made certain exculpatory representations about the 25 November question-and-answer period in its 29 March 1982 position statement. Thus, the statement asserts that "at no time during the two question and answer sessions" did Jones "state or imply that the Company had never had a layoff" or state that "if the Union gets in, there probably would be a layoff." (GC Exh. 4(b) page 2) This was apparently the substance of charges made by employee witnesses

during the investigation. Actually, the tape revealed, and I found, that Jones made these very statements. He pointedly told employees that he had avoided layoffs in the past (see my decision pp. 19-20) and he suggested layoffs if the Union won the election (if he had to "talk with" the Union it would "mean probably" employees "going home," see my decision pp. 19 and 21).

It is true, of course, that, before dismissing the mass layoff allegation, the General Counsel had available the results of interviews with employee witnesses who related what Jones said at the question-and-answer session of 25 November. But the investigator's report to the Regional Director (Resp. Exh. 66, p. 14) states that "the union witnesses are not in agreement as to what they heard." Thus, the General Counsel accepted the Respondent's benign representations of what Jones had said. Indeed, the failure to listen to the tape was crucial because the investigator had transcripts of Jones' prepared remarks, and he concluded that Jones would not have made unlawful remarks during a question-and-answer period after his speech that were at odds with his prepared remarks. The investigator stated (at p. 14 of his report) as follows:

> As the Union points out, regardless of what Jones may have read from the scripts, he may have deviated from the script or he may have [made] some of the alleged remarks during the question and answer sessions which followed the speeches (Jones claims he did not have such a session after the final speech on December 10, 1981. While this is entirely possible, I find it unlikely. Jones made it a point to tell his listeners that he was reading the speeches because he was under certain restraints. Jones had the benefit of both experience (a 1971 election campaign) and of labor counsel (who read and approved his speeches). Thus, I find it unlikely that he would have deviated during the reading or that he would have answered questions with answers

> which were, if said, so obviously contradictory or inconsistent with what he had just read minutes before.

I conclude that the investigator's failure to focus on the question-and-answer period and to assess accurately Jones' remarks therein was attributable, in great part, to the Respondent's misrepresentations about what Jones had said and its false statement that the tapes of his remarks were undecipherable.

In addition, the investigator's acceptance of the Respondent's assertions directly affected his recommendation that the General Counsel not issue a complaint on the layoff issue. He stated, "[n]or does the fact that in the past the Employer may have moved employees around from job to job support an unlawful motivation. . . ." (Resp. Exh. 66, p. 15). Yet, as the tape and my findings make clear (decision p. 21), Jones explained that moving employees from job to job instead of laying them off was a benefit which would be halted if the Union won the election. I found this statement unlawful and reflective of an unlawful motive for the layoffs. There is no way, in my opinion, that the General Counsel could have concluded that Jones' statement was not reflective of an unlawful motive had he had the tape recording during the investigation.[5]

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[5]Indeed, even though I only found two specific violations in Jones' remarks during the question-and-answer period, the General Counsel urged that other references by Jones to possible layoffs were also unlawful. (See my decision pp. 19-20). Even though I found no violation in these other references, the question was certainly a debatable one. Moreover, on this issue, The General Counsel need not succeed on the merits. The question is whether a complaint would have issued. Thus, the General Counsel may not only have believed that these additional references to layoffs were violations of the Act, but he may also have considered that references to no layoffs in the past were incongruous in view of actual layoffs 3 weeks later. At the very least, these references might have tended to buttress the credibility of employee witnesses whose testimony was not originally accepted.

Thus, Respondent's misrepresentations -- that the tape was undecipherable and that Jones did not make unlawful remarks during the question-and-answer period -- were material and they influenced the General Counsel's decision not to issue complaint on the mass layoff issue. Nor did the General Counsel exhibit a lack of due diligence in accepting the representations of Respondent's counsel. When an attorney -- who has certain ethical obligations -- represents that a tape is undecipherable when it is not, how is a public prosecutor supposed to react? Must he or she, in every case, use an investigatory subpoena to see if the attorney is telling the truth? I think not. By the same token, must he or she issue complaint based on what is viewed as uncertain testimony of employee witnesses when the respondent denies that any unlawful remarks were made and a tape of what happened -- the best evidence -- is misrepresented as being undecipherable and is not provided? The answer it seems to me is the same. The General Counsel may have been naive in relying on the representations of Respondent's counsel but I believe that the real blame lies with the Respondent. In reaching this conclusion, I am mindful of the District of Columbia Circuit's admonishment concerning fraudulent concealment in *ILGWU v. NLRB (McGloughlin Mfg. Co.)*, supra, 463 F.2d at 923, that

> [w]hen a clue is passed over by so many competent individuals, the fair inference is that exercise of reasonable diligence does not assure its notice and that lack of such diligence is not the explanation for its nondiscernment. A more likely explanation is simply that the clue was sufficiently hidden so that it was capable of nondetection even given reasonable diligence. To be sure, once the clue is uncovered, its significance seems patent and its discovery is easy, but it is not a new phenomenon that the seemingly obvious becomes so only after its discovery has eluded a good many others. Hindsight does not convict these others of want of reasonable diligence.

I find that the General Counsel's dismissal of the mass layoff allegations was influenced by Respondent's misrepresentations concerning the 25 November tape and what was said by Jones in the question-and answer-period on that occasion. In these circumstances, the Respondent's misrepresentations tolled the Section 10(b) statute of limitations as it might have applied to the General Counsel. Accordingly, the General Counsel's subsequent reversal of his dismissal decision was not violative of Section 10(b) and the Complaint amendment was proper.

The General Counsel and the Union make other contentions of misrepresentation with respect to the 29 March position statement. While the Respondent shaded its assertions and discussion of evidence in the position statement to its own ends, I do not find that Respondent made any other material misrepresentations which could not have been uncovered by the exercise of due diligence.

The General Counsel alleges that certain supervisory justifications of layoff selections were provided by the Respondent in its 29 March 1982 position statement. She alleges, however, that those justifications run counter to employee job evaluations, which were much more reliable because they were prepared about one week before the layoff. But, she continues, the more reliable evaluations were not provided to the Region during the investigation and were not mentioned in the position statement. I cannot conclude that the Respondent's reliance on the layoff justifications and failure to provide the evaluations amounts to misrepresentation or fraudulent concealment. The General Counsel surely knew the difference between layoff justifications and pre-existing employee evaluations. The Investigatory Report to the Regional Director (Resp. Exh. 66) makes it clear at p. 16 that the General Counsel knew that the supervisory justifications were "made *after* the selections for layoff" (emphasis in original). If the General Counsel wanted more objective evidence of employee performance *before* the layoff, he could have asked

employees whether they were evaluated and, given an affirmative answer, he could have asked for those evaluations.[6]

The General Counsel also alleges that the Respondent submitted "limited production sales figures" with its position statement in support of an alleged "cash flow crisis." The General Counsel alleges that more complete sales figures submitted at trial refuted Respondent's contention that little or no revenues were being received during the critical period before the layoff. The more complete sales figures showed fluctuating revenues over a longer period of time. Although Respondent's sales figures were perhaps incomplete, their interpretation was a debatable matter. It was obvious that Respondent was a defense contractor who had access to certain advance payments from the government. And there was nothing in Respondent's presentation of the salesfigures which would have prevented the General Counsel, by the exercise of due diligence, from inquiring about a broader set of figures. Moreover, the existence of several other bank accounts which were in a positive position effectively refuted the alleged cash flow crisis in Respondent's regular account. The position statement mentioned that Respondent was able to cover overdrafts in the regular account by using funds from another account. Accordingly, I do not believe that the

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[6]It is true, as the General Counsel suggests, that certain of the original written justifications had their dates altered to reflect that they were prepared the day of the layoff rather than the next day. For example, it appears that the original written justifications prepared by Supervisor Dorothy Jones had their dates altered. They were not provided in the position statement because they were "apparently misplaced," according to Respondent's attorney Kitch. These documents were later provided pursuant to subpoena and used to impeach Jones. There is no contention that these documents were significantly different from the justifications provided in the position statement, although, of course, they were different from the pre-layoff employee evaluations. The General Counsel in brief makes reference to these original justifications, but makes no specific allegations in connection with the failure to provide them. In any event, I fail to see how the failure to provide the originals had any impact on the investigation or the initial decision not to issue complaint on the layoffs.

Respondent's sales figures contained any particular misrepresentation about Respondent's cash flow situation which would toll the statute of limitations as it might apply to the General Counsel.

In sum, I have found that, on one particular issue, Respondent made material misrepresentations that the General Counsel could not have uncovered through due diligence and that would have affected his initial decision not to litigate the mass layoff issue. Thus, the statute of limitations was tolled until discovery of the true facts. Since the amendment to add the mass layoff allegation to the complaint came after such discovery during the trial of this case, the amendment was proper and not violative of Section 10(b) of the Act.[7]

B. The "closely related" Issue

The General Counsel and the Union also urge that the amendment allegations must be sustained because they are "closely related" to the original Complaint allegations. Member Dennis made specific reference to the "closely related" doctrine at footnote 9 of the *Ducane* decision. I find that the amendment in this case is indeed "closely related" to the original complaint allegations and thus must be sustained under well settled authorities that predate *Ducane*.

In *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (C.A. 2, 1952), cited by Member Dennis in *Ducane*, the court reviewed authori-

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[7]The Respondent argues that it should not be faulted in this case for having cooperated with the General Counsel during the investigation because there is nothing that requires it to submit any evidence to the General Counsel in the absence of a subpoena. The Respondent's argument misses the mark. The issue here is not whether a respondent should cooperate during an investigation. The issue rather is whether the statute of limitations applies when a General Counsel dismisses a charge based on misrepresentations during an investigation. Had Respondent not cooperated at all, the General Counsel would have been unlikely to have dismissed the charge since the dismissal was based primarily on assertions in the Respondent's position statement.

ties on the issue and rejected the contention that Section 10(b) precludes the amendment to a complaint based on a timely filed charge simply because the amendment comes more than 6 months after the alleged unlawful act. The court summarized settled law as follows:

> (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six months. (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.

See also *NLRB v. Hotel Conquistador Inc.*, 398 F.2d 430, 433 (C.A. 9, 1968); *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (C.A. 7, 1973); *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (C.A. 7, 1983); *Kelly-Goodwin Hardwood Co.*, 269 NLRB 33, 36-37 (1984), enforced in a memorandum opinion, Nos. 84-7243 and 84-7351 (C.A. 9, May 7, 1985). As the Board has stated:

> It is well settled that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge. This practice is wholly consistent with the statutory scheme, which establishes the charge merely as a vehicle for setting in motion the Board's investigatory machinery and, additionally, affords the Board leeway to issue a complaint

> on grounds other than those specifically set forth in the charge. [Footnotes omitted.]

Kelly-Goodwin, supra, 269 NLRB at 36-37.

The so-called "closely related" doctrine is broadly construed to give meaning to public rights. The relationship between the existing charge and the amendment allegations "need be close enough only to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge." *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 n. 3 (C.A. 5, 1970).[8] Thus, in *Kelly-Goodwin*, the allegations in the original charge involved different sections of the Act than those in the amended charge. And, in *Braswell*, amended allegations involved discharges at different and widely scattered locations of the same employer. The Seventh Circuit nevertheless approved the amendment, stating as follows:

> The practices complained of all occurred within the same general time period, a one to two month span of time. Although different locals were involved at each location, they were all members of the International Brotherhood of Teamsters. When the testimony concerning the specific unfair labor practices is viewed in the context of the respondent's past relationship with the teamsters, it is clear that the company's conduct at the three locations was part of an overall plan to resist

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[8]See also *Fant Milling, supra*, 360 U.S. at 307, where the Court approved the issuance of a complaint which contained allegations "related to conduct alleged in the charge and developed as one aspect of that conduct" while the proceeding was pending before the Board. In that case, as here, the Regional Director had dismissed the charge, but apparently an appeal was still pending before the General Counsel when the Regional Director reversed his decision to dismiss the charge. In any event, the Court stated that "[a] charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." *Ibid.*

> organization by the Teamsters. Too, the specific allegations in the complaint with respect to the Atlanta and Jackson terminals were of the same class and character as those set out in the original charge. Thus, we conclude that the respondent's conduct at its Atlanta and Jackson terminals was properly before the Board. 486 F.2d at 746.

In all of the cases, there is a recognition that Section 10(b) is no impediment to the amendment of a complaint or charge which involves incidents that are "similar to and arise out of the same course of conduct as those alleged in the timely filed charge." *Kelly-Goodwin, supra.*

Under these well settled principles, it seems clear to me that the amended allegation here was sufficiently related to the undismissed portion of the charge which spawned the Complaint. The amendment involved the layoff and refusal to recall all employees, the same discriminatory basis and section of the Act that undergirded the four refusals to recall that were the basis for the original Complaint. Both allegations involved the same employer and the same unit and arose out of the same campaign, which ended in a union victory in the election of 11 December.[9] They are also closely related in time. The layoffs were announced on Sunday 13 December, but some employees were recalled within a few days -- two were recalled on Tuesday 15 December. Supervisor Cora Robinson testified that a "couple of days" after the layoff, a shipment arrived at the plant that required the recall of employees. And another supervisor stated that President Jerry Jones was "upset" because the union had won the election, that Jones had a list of union supporters and said "these people would definitely not be coming back to work" (See

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[9] At the time of my original decision, the Board had upheld the validity of this election. Upon reconsideration, in a supplemental decision and order, the Board overturned the election results and ordered a new election. 276 NLRB No. 44 (24 September 1985).

decision pp. 13 and 24). Moreover, the Complaint also alleged that numerous statements and threats both before and after the layoffs illustrated Respondent's unlawful motive and independently violated Section 8(a)(1) of the Act. The layoffs were certainly related to those allegations. Finally, since the laid-off employees were recalled at different dates, it was virtually impossible to determine which, if any, employees were discriminatorily recalled without considering all the recalls as well as the original reason they were laid off. Surely the reason for the layoffs provided a backdrop to explain the reason for the recalls and, since some recalls took place within days of the layoff, the question lingers why a layoff occurred in the first place. For all of these reasons, I find and conclude that the allegation that all the employees were discriminatorily laid off and denied recall is "similar to" and "arises out of the same course of conduct" as the allegation that four laid-off employees were discriminatorily denied recall "as of December 14," the day after the layoff itself.

Even if the mass layoff allegation were found to be insufficiently related to the allegations of the original Complaint, the failure to recall all the laid-off employees certainly was closely related to the allegations of the original Complaint. The amendment alleged not only that 50 employees were discriminatorily laid off but also that they were discriminatorily denied recall. Since the original Complaint alleged that four employees were not recalled for discriminatory reasons, the failure to recall the other 46 is sufficiently related to the original Complaint under *Kelly-Goodwin* and its antecedents. As I have indicated, a number of laid-off employees were recalled within days of the layoff and the president of Respondent vowed that union supporters would not come back to work. Since Respondent began recalling some laid-off employees shortly after the mass layoff, it is appropriate to consider the recall issue under the so-called selection theory, which I analyzed at pp. 32-41 of my decision.

In considering Respondent's defense on this issue, I note that it is based solely on application of the Section 10(b) statute of limitations. (See p. 38 of its brief). Respondent does not allege

that there is something inherently wrong with the General Counsel's revival of a dismissed charge or that it was prejudiced by the General Counsel's amendment in this case. Indeed, the amendment was approved before either *Winer Motors* or *Ducane* was decided; thus, as I stated in my earlier decision, Respondent could not have been prejudiced because the law in existence at that time permitted the amendment. Here, as in *Kelly-Goodwin*, "the Respondent's argument is addressed only to the validity of the complaint under Section 10(b) of the Act, and raises no question of unfairness with respect to the preparation and litigation of its case." (269 NLRB at 36). Compare *NLRB v. Hotel Conquistador, supra*, 398 F.2d at 433 with *NLRB v. Complas, supra*, 714 F.2d at 73.

More specifically, Respondent contends that *Ducane* meant to overrule *Kelly-Goodwin* and that *Kelly-Goodwin* "cannot stand in light of *Ducane*." These are basically contentions that are better addressed to and by the Board. But I doubt very much that the Board overruled a case that it did not cite or discuss. Nor do I believe that the Board intended to overrule *sub silentio* not only a case, but the entire well settled court approved doctrine upon which it was based. Indeed, *Kelly-Goodwin* was decided after the Board's *Winer Motors* decision which applied Section 10(b) to withdrawn charges and which, according to Respondent, presaged *Ducane*. Rather, I believe that the Board left open the application of *Kelly-Goodwin* and its antecedents to this situation because the issue was never raised in *Ducane*.[10]

Since the "closely related" doctrine predates *Ducane* and was not addressed by the Board in that decision, it must be presumed to be compatible with *Ducane*. I believe that it is. The "closely related" doctrine recognizes that new allegations may be amended

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[10]The Board also did not pass on *Delta Metals, Inc.*, 236 NLRB 1665 at n. 2 (1978), and *Ace Drop Cloth Co.*, 178 NLRB 665 n. 1 (1969), where the "closely related" doctrine was applied even though the time-barred allegations had previously been dismissed.

into an existing case even though they were time barred by Section 10(b). There, as here, there were other viable charges which matured into complaint allegations thus permitting the General Counsel to bring time-barred allegations into existing litigation. There is no difference -- in terms of the Section 10(b) rationale of Ducane -- between allegations in a dismissed charge which "ceases to exist" (slip op. p. 8) and allegations which were never made part of a charge. If the latter time-barred allegations can properly be amended into a case pursuant to the "closely related" doctrine -- as the cases clearly hold -- then the former should also be susceptible to amendment if they likewise are "closely related." The policy behind Section 10(b) -- that stale allegations should not be litigated after records are lost and memories dim -- applies equally to both types of cases.[11]

Thus, there is no reason, based on the application of Section 10(b), to treat any differently a "closely related" allegation which has previously been dismissed from one that has not. Nothing either in the statute or in the *Ducane* decision itself suggests that there is anything inherently wrong with the General Counsel's revival of a dismissed charge. The Board's decision in *Ducane Heating* was not based on procedural or due process considerations. Its decision is based solely on the application of the 6-month statute of limitations period of Section 10(b). To illustrate this point, in *Ducane* itself, the Board approved reconsideration by the General Counsel of a previously dismissed charge even though the ultimate decision to go to complaint took place more than 6 months after the conduct alleged to be unlawful. The Regional Director's original dismissal was affirmed by the General

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[11]The purpose of the Section 10(b) limitations period is to prevent respondents from being "brought to book upon stale charges" and to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *Local Lodge No. 1424 I.A.M. v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 419 and 425 (1960), quoting from the legislative history and *NLRB v. Pennwoven, Inc.*, 194 F.2d 521, 524 (C.A. 3, 1952).

Counsel but the charging party filed a motion for reconsideration which the General Counsel ultimately granted. The Board thus specifically approved the General Counsel's revival of a dismissed charge after the limitations period had run, requiring only that the charging party's motion for reconsideration be filed or accepted within the Section 10(b) period. (See slip op. p. 4, discussing the Robinson charge)[12]

Application of the "closely related" doctrine to a previously dismissed charge does no greater violence to Section 10(b) than the Board's approval of the revival of the dismissed Robinson charge in *Ducane*. In both situations, the General Counsel's ultimate decision to include the dismissed allegations in the complaint takes place outside the Section 10(b) limitations period. However, in both situations, Section 10(b) is not violated. In Robinson, Section 10(b) was satisfied because the charging party's motion for reconsideration was filed and accepted within the Section 10(b) period. Here, Section 10(b) is satisfied because a "closely related," viable and undismissed charge was filed within the Section 10(b) period.[13]

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[12]Compare the *Mourning* decision of the District of Columbia Circuit cited supra.

[13]The instant case is factually distinguishable from *Ducane* in two other significant respects. In *Ducane* the General Counsel dismissed those portions of a charge (11-CA-8748) which involved two suspensions of employee McCrea. However, there, unlike here, there was no appeal by the charging party of the dismissal and the General Counsel *sua sponte* revoked his earlier dismissal. (*Ducane*, slip op. p. 6) Here, the charging party appealed the original dismissal and "requested reconsideration" by the Regional Director of his earlier dismissal (see my original decision at p. 3). It would appear that these differences would warrant not applying Section 10(b) in this case. A party who does not appeal the dismissal of a charge is similar to the party who has withdrawn its charge. When a charging party has thus acknowledged that no charge exists, the respondent may rightly assume that after 6 months have passed it need not defend against that charge. By the same token, where a General Counsel *sua sponte* revives the non-appealed charge, it appears that a public official is proceeding on his or her

Application of the "closely related" doctrine in this case also leaves untouched the essential holding in *Ducane*, based as it is on Section 10(b). Thus, whether or not a charge has been dismissed, where other charges against a respondent have resulted in the issuance of a complaint, the respondent knows that it will be going to trial. A consequence of going to trial is that new evidence may come to light and that "closely related" -- but not unrelated - allegations may be litigated by amendment even though the Section 10(b) period has run.[14] On the other hand, when all charges against a respondent are dismissed, no trial is contemplated and the respondent can be assured that the dismissed charges may not be revived after the Section 10(b) limitations period has passed.

Finally, there is every equitable reason to apply the "closely related" doctrine in this case. First of all, if it is not applied, employees would lose a cause of action through no fault of their own or of the charging party who espoused their interests. The charging party appealed the partial dismissal to the General Counsel and was precluded by law from obtaining court review of that determination. See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Thus, even though the charging party did everything required of it by Section 10(b) of the Act and pressed the matter as far as

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"own initiative" -- a procedure contrary to the statutory scheme. I realize that, however meritorious these factual distinctions might be, the Board's *Ducane* holding is broad enough to envelope them, absent application of the "closely related" doctrine. However, when one applies the "closely related" doctrine, consideration of these factors might serve to distinguish Ducane. For the General Counsel's sua sponte revival of the unappealed, previously dismissed charge in Ducane appears to pierce the outer limits of the "closely related" doctrine. See *NLRB v. Central Power & Light, supra.*

[14] Cf. *Millwright & Machinery Erectors, Local Union 720*, 274 NLRB No. 219 (1985) (time barred amendment and original charge "not closely related and did not arise out of the same course of conduct" because they "were separate and distinct acts, carried out at different times, for different reasons").

permissible, the employees would still be without a remedy. On the other hand, the Respondent has not suffered any prejudice. At the time of the amendment, Board law clearly permitted the amendment under Section 10(b). The amendment came during the trial of a "closely related" issue when neither the lapse of time nor the loss of memory or records hindered Respondent's defense. Respondent had no difficulty retaining records since it needed and used them in connection with the recall case, and, in any event, had preserved them by submitting position statements with copious attached documents and data. Respondent vigorously contested the issues presented by the amendment and suffered none of the adverse consequences suggested by the policy reasons underlying application of Section 10(b). Thus, if the allegation in the amendment is, as I have found, "closely related" to the timely filed charge which spawned the Complaint, the fact that the conduct occurred 11 1/2 months rather than 6 months before the date of the amendment should not preclude litigation of such a "closely related" allegation.

In sum, I conclude that my findings with respect to the discriminatory mass layoff and the discriminatory selection of employees for layoff are still viable because they were based on amended allegations "closely related" to the original Complaint allegations. I also conclude that my findings with respect to the discriminatory refusal to recall specific employees are still viable because they too were based on amended allegations "closely related" to the original Complaint allegations.

Dated, Washington, D.C. 11 December 1985

APPENDIX A

Unit employees laid off on December 13, 1981:

Karen Adams
Lula Armstrong
Della Balark
Ernest Barlow

Faye Beeks
Linda Berryhill
Frederica Bishop
Lionel Bland
Ozell Buchanan
Ronald Cason
Lydia Cuevas
Fred Dorsey
Mary Durham
Oliver Harper
Eva Y. Henry
Bernice Hill
Callie Hollins
Talma Jackson
Laverne Jackson
Earline Leavy
James Lewis, Jr.
Elaine Lindsay
Weader Lynch
Mae Rose Kelly
Annie Moody
Yolanda Morgan
David Morrison
Johnnie Murphy
Clara Nash
Frank L. Nissen
Annette M. Payne
Jerome Pogue
Laura Porter
Jonathan Rhodes
Georgia Robinson
Alyce M. Seay
Lillie Seals
Mattie Shaw
Vivian Shaw
Marion Sherron
Cheryl Shorty
Osie Perkins

Mary L. Smith
Marcie Staine
Alice Thompson
Bernice Wells
Beverly White
Nellie Wilson
Patricia Wines
Helen Woodard

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT threaten employees with layoffs, loss of benefits or other forms of reprisal for voting for the Union in a representation election.

WE WILL NOT interrogate employees about their union activities and those of other employees.

WE WILL NOT attempt to enlist or enlist the aid of employees in polling other employees as to their union activities.

WE WILL NOT create the impression that union activities are under surveillance.

WE WILL NOT inform our employees that they will not be recalled to work because of their union activities.

WE WILL NOT lay off, refuse to recall, or otherwise discriminate against employees with regard to their hire, tenure of employment, or any term or condition thereof, because of their union activities or in order to limit or discourage union activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer those employees laid off as a result of our unlawful conduct, as found by the Board, who have not already been recalled or rehired to their previous jobs, immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them and all other laid off employees whole for any loss of earnings, benefits or compensation connected with their employment status which they may have suffered as a result of our unlawful action.

WE WILL remove and expunge from our records and files any notations dealing with the layoffs of the employees found to have been discriminated against by the Board and notify them in writing that this has been done and that evidence of such layoffs will not be used as a basis for future personnel actions.

SONICRAFT, INC.

(Employer)

Dated By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or

compliance with its provisions may be directed to the Board's Office. 200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208, Telephone 312-353-7597.

NOT TO BE INCLUDED
IN BOUND VOLUMES

Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SONICRAFT, INC.

and Case 13-CA-22020

WAREHOUSE, MAIL ORDER, OFFICE TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ORDER REMANDING TO ADMINISTRATIVE LAW JUDGE

On 14 February 1984 Administrative Law Judge Robert A. Giannasi issued a decision in this proceeding. In his decision, the judge, *inter alia*, relied on the Board's decision in *California Pacific Signs*, 233 NLRB 450 (1977) in resolving whether the complaint amendment pertaining to certain December 1981 employee layoffs is time-barred by Section 10(b). The judge allowed the complaint amendment, finding it was timely under Section 10(b). Subsequently, on 11 January 1985, the Board issued its decision in *Ducane Heating Corp.*, 273 NLRB No. 175 (11 January 1985), which overruled *California Pacific Signs*. On June 4, 1984, the Respondent filed exceptions to the judge's decision, including his 10(b) findings, and a supporting brief. The General Counsel and the Charging Party each filed a brief in response to the Respondent's exceptions. The Respondent filed a motion to strike certain portions of the General Counsel's and Charging Party`s briefs. The General Counsel filed a response and opposition to the Respondent`s motion. The Respondent

filed a reply to the General Counsel`s response and opposition to Charging Party`s motion.

On 14 February 1985 the General Counsel filed a Motion to Remand Proceeding To The Administrative Law Judge For Further Findings Of Fact and Conclusions Of Law. By his motion, the General Counsel submits that, in view of *Ducane*, the Board should remand the case to the judge for resolution, based on the current record of all issues concerning the propriety of the complaint amendment in question, including, but not limited to, the issue of fraudulent concealment of evidence and the applicability of the "closely related" theory. On 1 March 1985 the Respondent filed an opposition to the General Counsel's motion. The Respondent contends that a remand of this case is not necessary to decide the questions raised by the General Counsel's motion. The Respondent further contends that the General Counsel's motion constitutes an attempt to file a belated exception to the judge's decision and to litigate a theory concerning timeliness of the amendment not previously raised before the judge.

The Board having duly considered the matter,

IT IS ORDERED that the proceeding is remanded to Administrative Law Judge Robert A. Giannasi for the limited purpose of addressing the Section 10(b) issues relating to the complaint amendment pertaining to the December 1981 employee layoffs in question in light of *Ducane Heating Corp.*, supra.

IT IS FURTHER ORDERED that the judge shall take whatever appropriate action is necessary to resolve these issues concerning the complaint amendment, including the establishment of a briefing schedule for the parties, if they desire to file briefs to the judge further addressing these issues.

IT IS ALSO ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth the resolution of such credibility issues, findings of fact, and conclu-

sions of law, and recommended order with respect to these issues relating to the complaint amendment in question. After service of such supplemental decision on all parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applied.

Dated, Washington, D.C., 27 March 1985.

By direction of the Board:

Joseph E. Moore

Associate Executive Secretary

JD-51-84
Chicago, Il

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SONICRAFT, INC.

and 13-CA-22020

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL & PROFESSIONAL EMPLOYEES UNION LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried for 24 days beginning on October 6, 1982 and ending on May 24, 1983 in Chicago, Illinois. The first seven days of hearing were held before Administrative Law Judge James J. O'Meara. On January 5, 1983, Judge O'Meara withdrew from the case, and, on that date, the case was assigned to me. The Complaint, as amended several times, alleges that Respondent violated Section 8(a)(1) of the Act by virtue of certain threats, interrogations and statements of coercion. It also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off some 50 employees 2 days after the Charging Party Union (hereafter, the Union) had won representation rights in a Board-conducted election and by thereafter refusing to reinstate or recall those employees for the same discriminatory reason. Respondent denies the substantive allegations in the Complaint and strongly urges procedural objections to the major amendment to the Complaint because it contained a part of the Union's charge which the Regional Director earlier had decided against

including in the original Complaint. The parties filed briefs and reply briefs totalling 398 pages which I have read and considered.

Based upon the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, an Illinois corporation, maintains its office and principal place of business at 8859 South Greenwood, Chicago, Illinois where it is engaged in the research, development and manufacture of electronic and electro-mechanical systems. Respondent also operates a facility at 9501 South Dorchester Avenue in Chicago, Illinois. During a representative one year period, Respondent, in the conduct of its operations, shipped goods and materials valued in excess of $ 50,000 from its facilities in Illinois directly to points located outside the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent, a minority-owned business which has been in operation since 1966, is essentially headed by Jerry Jones, its majority stockholder, who also acts as its President, General Manager, Chairman of the Board and Director of Marketing. Respondent employs a large complement of engineers as well as production and office personnel. All products manufactured and services performed by Respondent are pursuant to specific contracts with particular buyers. These contracts are almost exclusively with the federal government, particularly the Department of Defense. Thus, almost all of Respondent's revenue is derived from the United States Government. Approximately one-third of this revenue is the result of contracts for the manufacture of specific products; the remainder is derived from the sale of engineering services in the form of research and development.

Respondent receives aid from the Small Business Administration and has had various loan agreements with the First National Bank of Chicago from about 1968 through the period covered in this proceeding.

II. The Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Procedural Background

1. The representation case

On October 7, 1981, the Union filed a petition with the Board seeking an election among the Respondent's employees. On Friday December 11, 1981, a Board-conducted election was held in the following unit:

All full time and regular part-time production, maintenance and warehouse employees employed by Respondent at its Chicago facilities, but excluding office clericals, engineers, draftsmen, technicians, guards and supervisors as defined in the Act.

The employees voted for Union representation by a vote of 45 to 35. There were no challenged ballots. The Respondent did, however, file objections to the election which were overruled. The Union was certified by the Board on July 16, 1982. Respondent declined to recognize and bargain with the Union and, on July 8, 1983, the Board issued a decision finding that Respondent's refusal to bargain with the Union was violative of Section 8(a)(5) and (1) of the Act. The decision of the Board is reported at 266 NLRB No. 189.[1]

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[1]The case was on appeal to the Seventh Circuit Court of Appeals but, on January 4, 1984, the Court granted the Board's motion to withdraw its enforcement petition, without prejudice, "to permit further consideration by the

2. The unfair labor practice proceeding

On February 22, 1982, the Union filed a charge alleging certain violations of the Act, including an allegation that Respondent had violated the Act by laying off employees on December 13, 1981, and thereafter refusing to recall employees for discriminatory reasons. On April 29, 1982, the Regional Director sent a letter to the Union stating that he was refusing to issue a complaint on that aspect of the charge which alleged that the original layoff was unlawful. He indicated that "this dismissal is not intended to affect . . . allegations concerning [Respondent's] failure to recall certain employees which are alleged in a Complaint issued in this case on this same date." The Union appealed the Regional Director's action to the General Counsel's Office of Appeals in Washington, D.C. The General Counsel affirmed the "Regional Director's partial refusal to issue complaint" in a letter dated May 28, 1982. Thereafter, on July 7, 1982, the General Counsel denied the Union's request for reconsideration of his earlier decision. Thus, the General Counsel's original Complaint herein, which issued on April 29, 1982, alleged certain violations of Section 8(a)(1) of the Act as well as the violation of Section 8(a)(3) limited to the refusal to recall or reinstate employees Lulu Armstrong, Ernest Barlow, Weader Lynch, and Marion Sherron.

When the trial opened before Judge O'Meara, the General Counsel was permitted to amend the Complaint to allege two other violations of Section 8(a)(1) of the Act by President Jerry Jones. Several days into the trial, counsel for the General Counsel, citing new evidence obtained through the recent interview of an employee witness and in response to a subpoena of Respondent's records - primarily the production of a tape recording of a pre-election speech by President Jerry Jones, sought to amend the Complaint further by alleging that the original layoffs were unlawful. Thus, on December 1, 1982, the

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Board."

Regional Director sent a letter to the Union's counsel stating that "upon consideration of new evidence presented, I have granted your request for reconsideration and hereby revoke my partial dismissal in the above-captioned case, dated April 29, 1982." The same day, a written motion to amend the Complaint was submitted, alleging, inter alia, that Respondent laid off approximately 30 employees on December 13, 1981, and failed and refused to recall them for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

Judge O'Meara denied the December 1 motion to amend the Complaint. The General Counsel requested special permission to appeal the ruling and filed a brief in support of the appeal. The Respondent filed a statement in opposition. On December 8, 1982, the Board issued a telegraphic order granting the General Counsel's request for special permission to appeal, reversed the Administrative Law Judge, and directed him to grant the motion to amend. The motion to amend was subsequently granted.

On January 25, 1983, Respondent moved the Board for *en banc* reconsideration of its decision approving the amendment of the Complaint, relying particularly on the Board's decision in *Winer Motor's Inc.*, 265 NLRB No. 185, which had issued on December 16, 1982. On February 7, 1983, the Board denied Respondent's motion "without prejudice to Respondent's right to renew its contentions through the filing of an appropriate exception . . ."

When I took over this proceeding, I was confronted with a number of motions and subpoena issues all relating to the contested amendment to the Complaint. Granting Respondent's request in this respect, I directed that the General Counsel specify the employees discriminated against. Counsel for the General Counsel provided a list of such employees which turned out to number 50 instead of the "approximately 30" alleged in the amendment. In addition, the Respondent was permitted to file an answer to the amended Complaint which preserved its

objections to the granting of the amendment. In an attempt to rebut Respondent's procedural objections as set forth in its answer to the amended Complaint, the Union sought the General Counsel's permission to allow the Board investigator to testify. The Regional Director apparently also made a similar request. In two separate telegraphic orders dated March 4, 1983, the General Counsel granted his permission for the Board investigator to testify in this proceeding. In pertinent part, the General Counsel's telegram permitted the investigator to testify "with respect to whether the evidence relied upon by counsel for the General Counsel was previously offered and/or provided to Board Agent Klaeren during the investigation of the charge." The General Counsel also answered an earlier request by the Respondent for material contained in the investigatory file and permitted Respondent to obtain "copies of all material, if any, in the case file indicating whether the Regional Director was aware or should have been aware, at the time the disputed allegations were dismissed, of the evidence now relied upon in amending the Complaint to include those same allegations." During the hearing, counsel for the General Counsel resisted turning over some parts of the investigatory file. However, after an *in camera* inspection of the file and in view of the General Counsel's grant of permission for the investigator to testify and his partial waiver of any confidentiality interests in the file, I ruled that the entire investigatory file be turned over to the Respondent.

After the completion of the case on the merits, I took evidence on the procedural issue raised by the Respondent concerning the propriety of the amendment to the Complaint. The evidence took the form of testimony by the Board investigator, Edward Klaeren, Respondent's president, Jerry Jones, and its attorney, Bettye Kitch, as well as the introduction of documentary evidence from the Board's investigatory file.

3. The propriety of the amendment

Respondent asserts that a major portion of the Complaint in this case -- the allegation that the December 1981 layoff was

unlawful -- should be dismissed because it became part of the formal litigation herein by virtue of an amendment which violated Section 10(b) of the Act. Respondent contends that the amendment was improper because the General Counsel had earlier decided against proceeding on the layoff issue and his subsequent change of position occurred more than 6 months after the layoff herein. The General Counsel and the Charging Party, on the other hand, contend that a valid charge was filed within 6 months of the layoff, and, although part of it was not included in the original complaint, Section 10(b) was fully complied with.[2]

The most important facet of this issue is the Board's role in deciding it. The Board itself reversed Judge O'Meara and ordered the Complaint amended. It was well presented with voluminous briefs discussing the Section 10(b) issue as well as the applicable case law. Again, on motion for reconsideration, after the Board handed down its decision in the *Winer Motors* case, the Board considered the entire issue in the context of *Winer Motors*, approved the amendment, and, in effect, ordered me to proceed with he hearing of the legality of the layoffs. Although the Board's order had an ambiguous cast on it -- permitting Respondent to raise the issue on exceptions, it seems to me that the Board made the determination that, in this case, the amendment was proper and that *Winer Motors* did not apply. Accordingly, I believe that I am bound by the Board's determination that the amendment was proper.

Contrary to Respondent's contention, the Board's determination appears to be consistent with Board and Court precedent. *Winer Motors* is distinguishable from the present case. In that case, the Board held that the reinstatement of a withdrawn charge was inconsistent with Section 10(b) of the Act because after a voluntary withdrawal of a charge no charge existed and

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[2]Section 10(b) of the Act provides, *inter alia*, that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board . . ."

more than 6 months had elapsed since the events alleged to be unlawful had occurred. Member Zimmerman's swing vote for the majority in *Winer Motors* makes clear that the situation involving the reinstatement of a dismissed charge, or, more precisely, a reversal by the General Counsel of his initial determination not to issue a Complaint, warrants a different result. The Board thus did not overrule California Pacific Signs, Inc., 233 NLRB 450 (1977), which recognizes the General Counsel's virtually unlimited discretion to proceed on such charges after he has initially refused to issue Complaint on them. Member Zimmerman's rationale is that, in this situation, a valid charge has been filed, and, technically, the strictures of Section 10(b) have been complied with. This seems an even stronger case than California Pacific Signs because the General Counsel did not dismiss the entire charge but proceeded to Complaint on only part of it, and, at trial, amended the Complaint to bring in the remainder of the charge.

There seems to be no authority for the proposition that Section 10(b) runs against the General Counsel in circumstances where the Charging Party has done all that is required under Section 10(b) (see *Local Lodge No. 1424, I.A.M. (Bryan Mfg. Co.) v. N.L.R.B.*, 362 U.S. 411 (1960)) and where the Charging Party has consistently pressed for full litigation before the Board. The General Counsel does not initiate charges but has exclusive statutory authority with respect to the investigation and issuance of Complaints. This point is illustrated by *Mourning v. N.L.R.B.*, 505 F.2d 421 (1974), where the District of Columbia Circuit upheld the reversal by the General Counsel of his initial decision to refuse to issue a complaint despite the Board's disagreement. In that case the charging party, Robert Mourning, through his attorney, filed a motion for reconsideration by the General Counsel of his initial refusal to issue a complaint on the basis of newly discovered evidence. Because a similar motion had been previously filed and denied, the General Counsel's Office of Appeals treated this as a "second motion for reconsideration" and denied it on the basis of the Board's decision in *Forrest Industries, Inc.*, 168 NLRB 732 (1967). Over two years later, pursuant to

Mourning's further requests through his attorney, the General Counsel reopened Mourning's appeal, reversed his earlier decisions and issued a complaint in Mourning's behalf. In an answer and motion to dismiss presented to the Administrative Law Judge, the employer argued that *Forrest Industries* had been properly applied by the General Counsel when he had refused to entertain the "second motion for reconsideration." The Administrative Law Judge rejected this argument, but the Board reversed the Administrative Law Judge on appeal and dismissed the complaint, holding that *Forrest Industries* prevented the General Counsel from prosecuting the case. On Mourning's petition for review to the District of Columbia Circuit, the Court reversed and remanded to permit the General Counsel to re-file the complaint on behalf of Mourning. 505 F.2d at 423.

The Court rejected the contention that a general policy of laches precluded the General Counsel's reversal of position and emphasized that Section 10(b) acts as a statute of limitations with respect to the conduct of a charging party and not the General Counsel. Id. at 424, nn. 9 and 10. As the Court stated, "To permit the General Counsel to negligently cause the elimination of the charging party's rights would raise very fundamental questions about the nature of the charging party's 'rights' upon suffering the effects of an unfair labor practice and the nature of the General Counsel's prosecutorial responsibilities." *Ibid.* See also, *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 568 (C.A. 2, 1967), cert. denied, 392 U.S. 908 (1968).

This is not to say that the General Counsel's reversal of an initial decision not to proceed to Complaint on part of a charge may not raise problems of fairness or procedural due process. For example, the Board has dismissed complaint allegations because those allegations could have and should have been litigated in prior unfair labor practice proceedings. See, *Jefferson Chemical Co.*, 200 NLRB 992 (1972) and *I.T.T. Lighting Fixtures, Division of ITT Corp.*, 267 NLRB No. 116 (1983). The instant case, however, is different and contains no elements of unfairness or lack of due process so far as I can determine. There was, in

this case, no prior unfair labor practice litigation during which the mass layoff issue could have been litigated. The General Counsel obtained certain evidence by virtue of subpoena actions during the initial stages of this litigation, and, upon studying it, rescinded his earlier decision not to include certain matters in the Complaint. When the Complaint was amended, full opportunity was given to the Respondent to prepare its defense and to answer the new Complaint allegations. Not only was the layoff issue presented in the amendment reasonably related to the recall from layoff issue in the original Complaint, but evidence of the former was effectively intertwined with evidence of the latter. Finally, both at the time of the General Counsel's refusal to go to complaint on the layoff issue and at the time of the amendment, Board law was quite clear that the General Counsel had broad and unlimited discretion in this area. It is thus difficult to see how Respondent suffered any cognizable prejudice.

In any event, as noted above, in the posture of the case before me, I believe that the Board has spoken and has ruled, consistent with *Winer Motors* and *California Pacific Signs*, that the General Counsel acted within his statutory discretion when he decided to proceed on the layoff aspect of the Union's charge by amendment even though he had earlier indicated he would not proceed to complaint on this issue.

IV. The Alleged Unfair Labor Practices

A. Background: The Union Campaign, the Election and the Layoff

The Union began its organizing campaign on August 28, 1981, when Union Representative Roy Blake and other officials began distributing union literature and authorization cards in front of Respondent's 88th Street facility. That same day, President Jerry Jones distributed a letter to employees urging them not to sign union authorization cards. The Union, however, obtained a sufficient number of cards to support a petition for an election, which was filed on October 7, 1981. Thereafter, the employees

were flooded with literature from both the Union and the Respondent on the advisability of voting for union representation. During the campaign, Blake and other union representatives distributed literature or solicited employee support near Respondent's premises about once a week. The Union also held three general meetings for employees.

On September 29, the Union held its first general meeting for Respondent's employees at a local restaurant. During that meeting, several employees volunteered to serve on an employee organizing committee whose purpose was to solicit the signature of authorization cards, promote the Union and provide information about Respondent's campaign efforts. During the campaign, the committee met several times at Blake's home. The committee members were Lula Armstrong, Ernest Barlow, Weader Lynch, Annette Payne, Alyce Seay, Marion Sherron and Bernice Wells. Eva Henry, James Lewis, Cheryl Shorty and Helen Woodard attended some of the meetings and worked closely with the committee.[3]

Respondent's president, Jerry Jones, made three speeches to assembled employees on company time, urging them to vote against union representation. These speeches were delivered in Respondent's cafeteria, a rather small room with six tables, which were removed for the speech, chairs and vending machines. The first speech was delivered on November 25, the second on December 3, and the third on December 10, the day before the election. Two of the speeches were followed by question-and-answer periods. Two of the sessions were taped. The two tapes were subpoenaed for use in this proceeding. One of the tapes was not decipherable, but the other, that of November 25, which was partially erased, was transcribed and both the transcription and the tape itself were received into evidence.

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[3]Several other employees attended the first committee meeting but did not attend any others or thereafter work with the committee.

The Union won the election, which was held at Respondent's facilities on Friday, December 11. The vote count was held on Friday afternoon in the cafeteria and it revealed that 45 employees had voted for union representation and 35 against. Jerry Jones and a number of other officials of Respondent and the Union were present. Also present were employees Lula Armstrong, Ernest Barlow and Marion Sherron, who had served as the Union's election observers. That evening, after work, a group of union supporters met for a "victory celebration" at a local pub. Those attending were union observers Armstrong and Barlow and employees Eva Henry, Weader Lynch, Annette Payne, Alyce Seay, Bernice Wells and Helen Woodard. Two other nonunion employees, Durrell (Skip) Smith, who several employees believed was the son of Supervisor Cora Robinson, and Clayton Starks, appeared at the pub, stood or seated themselves separately from the celebrants and observed them for a time.[4]

On Sunday December 13, Respondent laid off 50 of the 92 employees in the election unit. The employees were called at home by supervisors who came into the plant on Sunday for this purpose. Only one nonunit employee was laid off and no supervisors were laid off or demoted.[5] The laid off employees received letters, dated December 14, informing them that the layoffs were indefinite; on December 18, they were notified that their insurance coverage had been terminated effective December 15.

Several employees were recalled within days after the layoff. A larger number were recalled in February 1982. Thereafter, a

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[4]Neither Smith nor Starks was included in the December layoff, but they had either quit or been terminated by the time of the hearing. Neither testified in this proceeding.

[5]The nonunit employee who was laid off was a technician, Bruce Hickman, who also served as one of Respondent's election observers. There was no evidence as to why he was laid off.

number of new employees were hired. Between February 1982 and February 1983, Respondent hired about 10 new employees classified as "storeroom clerk" or "janitor." In February 1983, Respondent rehired Lula Armstrong, Weader Lynch and Alyce Seay, after requiring them to pass a three part test which was different and more difficult than that which had been required at the time of the employees' initial hire. The new testing program was apparently implemented sometime after December 1982. None of the existing employees was required to pass the test. No other laid off employees returned to work, and, beginning in March 1983, Respondent hired a number of new employees for unit positions and was continuing to do so at the time of the hearing.

B. Allegations of Coercion and Evidence of Union Animus and Unlawful Motive

The General Counsel relied on a number of statements made and incidents engaged in by Respondent's officials which were alleged as violative of Section 8(a)(1) of the Act as well as several other statements and incidents, which, although not alleged as independent violations, were alleged to show Respondent's animus against the Union and its unlawful motivation for the layoffs. Except for the November 25 remarks of Jerry Jones, which were tape-recorded, the other statements and incidents involve conflicts in testimony which I am called upon to resolve. I have resolved these credibility conflicts by considering not only the cold record but also the demeanor of the witnesses -- the facial impressions, the inflection of voice, the halting or straightforward character of speech and other intangibles which are difficult to articulate but form the basis of a trier of fact's observation of witness demeanor at a hearing.

1. Cora Robinson's statements to employee Henry

In September 1981, Supervisor Cora Robinson had a conversation with employee Eva Henry near Robinson's desk. Robinson said that she "had heard that Faye [Beeks] and [Henry] were

Union organizers."[6] Henry asked from whom Robinson had heard this information. Robinson said she "had her ways of finding out." Robinson also asked if Henry had been to any union meetings or had signed a union card. Henry replied "yes" to both questions. In another conversation during the same day, Robinson asked Henry if she knew how the "girls on her line" were voting. When Henry said she did not, Robinson asked her to ask them how they were voting. Henry gathered five employees together for this purpose, but did not actually question them. Robinson later asked for a report and Henry said, "everything's OK."

The above is based upon the testimony of Henry. Cora Robinson essentially denied the statements attributed to her. I credit Henry's testimony. Henry impressed me as an honest witness whose testimony survived vigorous cross-examination. Robinson, on the other hand, testified that she had been fired by Respondent for lying about whether her son had been employed by Respondent. At the hearing there was an issue as to whether Respondent had learned the identity of certain prounion employees because Durrell (Skip) Smith, who some employees believed was Robinson's son, was present at the victory celebration after the Union won the election and whether he reported this fact to Robinson. Robinson denied that Smith was her son, although she conceded that employees thought him to be her son. She testified that former employee Durrell Robinson was her son -- although at one point in her testimony, she made a momentary slip and named Smith as her son. She also testified that, in February of 1982, President Jerry Jones or Plant Manager Willie Taylor asked her whether Durrell Robinson was her son and she denied it. According to Robinson, when they found out the truth, she was shown her son's birth certificate and fired. Robinson was unable to identify where her son worked and there

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[6]Henry testified only to the name Faye, but documentary evidence confirms that the only Faye among the employees was Beeks. Robinson supervised both employees.

is no other evidence that a Durrell Robinson was ever employed by Respondent. I found Robinson's testimony on this point totally unbelievable. Why would Respondent investigate or be concerned about the employment of Robinson's son in February of 1982 when, according to Robinson, he had been employed only a short period of time and had not been employed for some 4 months? And what reason would Robinson have to lie about the employment of her son? Contrary to Robinson's testimony, there appears to be no rule against employing children or other relatives of employees at the plant. Jerry Jones' son and stepfather were employees and Dorothy Jones' daughter and Jerome Jones' wife also worked at the plant. There was testimony that Dorothy Jones had told employee Weader Lynch that Cora Robinson had informed management officials of the celebration and identified its participants. Robinson's evasive and dissembling testimony not only lends credence to this testimony, but also casts considerable doubt on Robinson's own reliability as a witness.

In accordance with the credited testimony, I find that Robinson unlawfully interrogated Henry about her union activities, sought to enlist her aid in polling employees as to their union activities and created the impression that Respondent had the union activities of employees under surveillance. These were not isolated violations. There were several interrogations and they were interspersed with a request to engage in polling and a statement which indicated that Respondent had ways of finding out about union activities. Accordingly, I find that, by virtue of Robinson's statements and conduct, Respondent violated Section 8(a)(1) of the Act.

2. Rufus Denson's statements to employee Harper

One day in November 1981, just before lunch, while he was working at his punch press in the machine shop, employee Oliver Harper was approached by his supervisor, Rufus Denson. Denson, who had no work-related reason for approaching Harper, asked Harper how he felt about having a union. Harper stated that he was once "a member of the UAW" and stated that

he did not have anything against labor unions. Denson said he had been a member of the Teamsters Union and had been a union steward. He said, however, that labor unions were "no good" and caused "confusion and problems." Denson also mentioned a book he had about the Teamsters Union which he wanted to show Harper, but could not because of the election. At some point during this conversation, apparently after the first question, Jerome Jones, the son of President Jerry Jones, and Robert Freeman, Jerry Jones' stepfather, walked over and remained for the rest of the conversation. They nodded assent to some of Denson's remarks.[7]

Later, about one week before the election, in the afternoon, Denson approached Harper and fellow employee, Bertram Hayes, at their work station. He asked them how they were going to vote. Harper described this as a "kind of funny question." Harper said he did not know but that he would vote in his "best interest." Hayes also told him he did not know. Denson thereafter stated that "if the Union did get in" Jerry Jones could "either move the company, hire new employees or lay off the employees he had" and that the employees "would be the ones to not have a pleasant Christmas and be in the unemployment line."

Harper testified that Denson also approached him, on the day of the election, "smiled in a joking way" and said, "[H]ow are you going to vote? You can tell me." Harper responded, "I really don't know."

The above is based on the testimony of Harper, who impressed me as a candid and reliable witness. He placed the conversations in context and testified in meaningful detail. His candor was demonstrated by his admission that he could not place in context or give detail about the speeches of Jerry Jones and that he had

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[7]Freeman did not testify about this matter. Jerome Jones denied being present at any such conversation, but I found him not to be a reliable witness and do not credit his denial.

less experience than other employees in the machine shop. This was significant because it would have been in his interest to demonstrate his flexibility -- which was supported by his experience at other jobs before coming to Sonicraft -- in order to bolster his case that he was discriminatorily laid off.

Supervisor Denson denied that he questioned Harper about his union activities. He testified to a conversation, about a week before the election, between him and Harper in the presence of Hayes, but denied asking "how anybody was going to vote." Denson also testified that, after one of President Jones' speeches, Harper called him over to the place where Hayes and Harper were working and asked if "the company was going to move or have a layoff, because there had been rumors of it." According to Denson, he told Harper "anything was possible." Hayes also testified about the latter conversation but did so only briefly and in a conclusory manner. He testified that he did not hear Denson discuss with Harper how the latter would vote and he denied that Denson had ever asked him, Hayes, that question. Hayes did not give any other details about the conversation and said nothing about who initiated the conversation or whether there was any discussion about layoffs or a move.

Denson did not impress me as a reliable witness. Nor did he testify in as detailed or candid a manner as did Harper. Further, in a very significant piece of testimony, Denson was shown to have contradicted himself concerning another prounion employee under his supervision, Ernest Barlow, whose selection for layoff was alleged to be discriminatory. Denson first testified that Barlow had never performed any spray painting and he denied telling anyone that Barlow had performed such work. Yet, in a memorandum dated August 21, 1981, Denson had indicated that Barlow was "doing spray painting" and sought a raise for Barlow. Denson's effort to explain this inconsistency did not reflect favorably on his reliability as a witness.

In accordance with my assessment of the evidence and the witnesses set forth above, I credit Harper's account of the

conversations in November of 1981 and on the day of the election. As to the conversation which took place one week before the election, I must take into account Hayes' version. He denied hearing Denson question Harper as to how he would vote in the election and denied that he himself was questioned by Denson. This is directly contrary to Harper who testified that both employees were questioned. I have no reason to reject Hayes' testimony. He was not effectively cross-examined on this point and had no reason to testify falsely. Thus, even though I was impressed generally by Harper, it is possible that he was mistaken about the interrogation portion of the conversation, and I find that the General Counsel has not proved by a preponderance of the evidence that Denson questioned Harper in the conversation which took place one week before the election. However, I do credit Harper's version of that part of that same conversation that dealt with a possible layoff rather than Denson's version. It is obvious from the testimony of both Harper and Denson that there was some discussion of a possible layoff. Hayes did not testify about such a discussion. He corroborated neither Hayes nor Denson on this score. In these circumstances, I view Hayes' testimony, limited as it was, as having no significance in determining what was said about possible layoffs in the conversation between Harper and Denson one week before the election.

In accordance with the credited testimony, I find that, in November 1981, Denson unlawfully interrogated employee Harper as to how he viewed unions and how he would vote in the upcoming election. The interrogation was followed by a discussion by Denson of the "trouble" with unions, and, thereafter, Respondent's production manager and the president's son joined Harper and Denson. No purpose for the questioning was given and no assurances against reprisals were offered. In all the circumstances, I find that the interrogation was coercive. In addition, I find that Denson's statement that Respondent would lay off employees or move the plant if the employees selected the Union constituted a violation of Section 8(a)(1). Since the

statement was not based on economic considerations it amounted to an unlawful threat of reprisal.

I do not find a violation, however, in Denson's questioning of Harper the day before the election about how he was going to vote. Harper's own testimony strongly suggests that the question was a simple one followed by no further discussion about the union campaign and was done in a joking manner. In these circumstances, I do not find that the question amounted to a coercive interrogation and I shall dismiss this portion of the Complaint.

3. Dorothy Jones' statements to employee Lynch in November and December of 1981

Sometime in November of 1981, employee Weader Lynch had a conversation with her supervisor, Dorothy Jones, at Jones' desk. Jones asked if Lynch had attended the union meeting held the night before. Lynch said that she had. Jones also asked if employee James Lewis had attended the meeting. Lynch said he had not and asked why Jones was asking about him. Jones said that Lewis was being "watched by personnel" because of his union activities. She also said that Lynch should watch herself and that she and Lewis should stay busy. She was told to pass the message on to Lewis and she did.

On the day of the layoff, Sunday December 13, 1981, Lynch was notified of her selection by Rufus Denson who told her that she was being laid off because of "lack of materials." Lynch said she did not understand because there was "plenty of work" when she left work on Friday. She also questioned why her supervisor had not called her. Denson replied that there were so many calls that he was helping out. That day or the next, Lynch called Jones at home. When Lynch questioned her about who was kept and who was not, Jones said "it wasn't up to her to determine who was being kept." Jones told Lynch that Cora Robinson had given Jerry Jones a list of the people who had attended the victory celebration on Friday night after the election results had

been announced. She also said that Jones was very upset "because the union had won" and that Jones said that "these people would definitely not be coming back to work." Lynch replied that she did not believe that Cora Robinson followed the group as Jones reported, but that she noticed that Robinson's son was present at the victory celebration.

The above was based on the testimony of Lynch. Jones denied that she had engaged in any of the above-mentioned conversations. I credit Lynch's version of both conversations. She impressed me as an honest witness who was employed by Respondent when she testified and was testifying against her employer's interests. Her testimony also survived vigorous cross-examination. Jones, on the other hand, seemed to me not to have been a candid witness. In observing her demeanor, I thought she was holding something back. For example, her denial that she even talked to Lynch about the layoff seems to me implausible. Lynch was one of Jones' group leaders and she was notified of her layoff by a different supervisor. It is thus plausible that Lynch would have sought direct confirmation from her own supervisor, Jones. Jones' failure to confirm even this aspect of Lynch's testimony calls into question her reliability as a witness. Moreover, Lynch's testimony concerning Jones' wanting to have Lynch back is confirmed by Jones' own testimony that, in February of 1982, she had recommended the recall of Lynch but that her superiors overruled her. That Jones would have been so frank with Lynch is not unusual since Lynch had greater seniority than Jones at the plant, and, according to uncontradicted testimony, had supported Jones when some employees exhibited resentment that she had been appointed a supervisor from outside Respondent. This created a "bond" between the two, and, indeed, Jones had attended a party for Lynch shortly before the layoff.

Also adversely reflecting on Dorothy Jones' credibility is the fact that certain documents which she prepared after the layoffs attempting to justify her selection of some union adherents for layoff were inconsistent with performance reviews or evaluations

prepared by her a week or two before the layoff. The justifications were prepared on December 14, the Monday after the layoffs, but they were clearly altered to reflect the date of December 13, the Sunday when the layoffs took place. These justifications were attached to a position statement submitted by Respondent's counsel, Bettye Kitch, to the Regional Director during the original investigation of this case. They were introduced at the hearing by the General Counsel to impeach Jones' testimony and they do just that. For example, on December 4, Jones rated Lula Armstrong "excellent" on productivity; on December 14 she rated her "good." On December 9, she rated Weader Lynch "excellent" as to productivity and attendance; on December 14, she rated her "good" on productivity and dependability. On December 4, she rated Annette Payne "excellent" on productivity; on December 14, the rating had changed to "good." And, on December 4, she rated Alyce Seay's productivity "good," but, on December 14, she rated it "fair." Since the performance evaluation forms specifically listed four ratings -- excellent, good, fair, unsatisfactory -- and since so little time elapsed between the different ratings, it is unlikely that these discrepancies were inadvertent mistakes. The post-layoff justifications were submitted with Respondent's position statement; the pre-layoff evaluations were not even mentioned in the statement.

In accordance with my credibility determination, I find that Jones unlawfully questioned Lynch about her union activities and those of employee Lewis. Such interrogation was unaccompanied by assurances against reprisal and there was no purpose given for the questioning. Thus, the interrogation violated Section 8(a)(1) of the Act. I also find that Jones' statement to Lynch that Lewis was being "watched by personnel" because of his union activities and Jones' subsequent comment that Lynch should watch herself and that she and Lewis should stay busy created an unlawful impression that the employees' union activities were under surveillance, in violation of Section 8(a)(1). Furthermore, these remarks added to the coercive circumstances surrounding the interrogation, particularly since Lynch, as a group leader, was told to, and actually did, report the message to Lewis. In addition, I

find that Jones' statement in December of 1981 that employees would not be coming back to work because Jerry Jones was upset with the outcome of the union election not only reflected Respondent's union animus and its motivation for the layoffs, but also constituted an independent violation of Section 8(a)(1). See Rogers Mfg. Co., 228 NLRB 882, 886 (1977); Circus Circus, 244 NLRB 880, 884 (1979), enf. in pert. part, 646 F.2d 403 (C.A. 9, 1981).

4. Robert Freeman's remark to employee Durham

Employee Mary Durham testified that, on Monday morning, December 14, she went to the plant and learned that she was one of the laid off employees. She talked to Production Supervisor Robert Freeman and asked permission to go to her work station to pick up her personal belongings. According to Durham, as Freeman accompanied her to her work station, Durham asked why the employees were laid off. Freeman replied that work was slow, "plus the Union came in."

Freeman admitted to having a conversation with Durham about her being on the layoff list and escorting her to her work station but denied saying anything more to her. I credit the testimony of Durham. She reaffirmed her testimony during cross-examination. Moreover, I believe it plausible that she asked Freeman why the employees were laid off. She had not been notified of the layoff as the others had the day before and she would naturally have been curious about it. Freeman seemed to me the kind of person who, at the time and in the circumstances of the moment, would have made an unguarded but revealingly truthful response to Durham. On the other hand, as a witness, Freeman seemed less than candid not only on this issue but also on other issues such as his denial that he intentionally observed union officials passing out literature. His effort to counter this allegation by stating that it was his normal practice to take his coffee outside the plant was strained. In addition, I thought his testimony concerning the recall of two employees for the packaging department was vague and evasive. Finally, Freeman was Jerry Jones' stepfather and I

perceived, in his demeanor, a reluctance to give testimony adverse to Respondent's interests.

In accordance with my credibility determination, I find that Robert Freeman did indeed tell employee Mary Durham that a reason for the layoff of December 13 was because "the Union came in." No allegation was made that the statement constituted a violation of Section 8(a)(1), but it was alleged that it bears on Respondent's motivation for the layoff. I agree. Freeman was part of management and, as production manager, he was privy to the deliberations undertaken by Respondent to effectuate the layoff. Cora Robinson testified that she discussed her selections both for layoff and recall with Freeman. And, according to Jerry Jones, he talked with Freeman in early December about the conditions which led to the layoff.

5. Jerome Jones' statements to employees and union representatives

The General Counsel, relying on the testimony of several employee witnesses and that of Union Representative Roy Blake, alleges that the son of President Jerry Jones, Jerome Jones, a clerical employee who is alleged to be an agent of Respondent, made statements which show Respondent's union animus and its unlawful motivation for the December 1981 layoffs. Three separate incidents are relied upon. First, it is alleged that Jerome Jones had an altercation with Blake while Blake was distributing union literature to employees and revealed the Respondent's opposition to unions. Second, it is alleged that Jones told a fellow clerical employee, Hameeda Bahah, that his father was going to lay off employees and actually did lay off employees because of union activities.[8] Third, it is alleged that Jones told

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[8] I do not accept Bahah's testimony. Her testimony was quite vague on cross-examination and she appeared to harbor some personal animus toward Jerome Jones and toward Respondent for having discharged her. Jones himself was not a reliable witness, particularly when pitted against Blake and Berryhill, who were

employee Linda Berryhill that his father would lay off employees "if the Union gets in." These allegations require certain credibility determinations because Jerome Jones denied making the objectionable statements. But a more significant threshold issue is presented because Respondent denies that Jerome Jones is an agent and disputes whether his statements can be used to show Respondent's animus or motivation.

On the issue of agency status, and, more particularly, on the question of whether the remarks of Jerome Jones are reliable indicators of Respondent's motive, I agree with Respondent. The crucial and determining factor in establishing the nature of an agency relationship is the scope of authority, actual or apparent, conferred upon the alleged agent by his superiors. See *F & D Enterprises, Inc.*, 251 NLRB 1199, 1207 (1980). In turn, the reliability of any statement that an agent might make concerning company policy depends on its relationship to matters over which he has been granted authority. See, 4 Wigmore, *Evidence*, section 1078 (Cladbourne rev. 1972 & Supp. 1983).

Jerome Jones began working for the Respondent in June 1978. At the time of the election, he was a bid clerk earning $ 7.50 per hour. His job involved receiving government bid solicitations, recording them in a log, and notifying his father and other management officials that they had been received. If a bid decision was made, he would coordinate the assimilation of information from various departments and present it to his father. However, he had no voice in the decision making process and generally checked the assembled information for accuracy only. There is no evidence that he utilized independent judgment in any of his responsibilities. Nor is there any evidence that he had

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impressive witnesses. Jones' testimony about his encounter with Blake was implausible and his denial that he was present at the vote count after the election was counter to the credible testimony of several witnesses. Nevertheless, as between Bahah and Jones, two unreliable witnesses, I cannot sustain the General Counsel's version of their conversations.

any responsibility in the area of employee relations. He was a clerical employee who worked in a different area than the production employees. It appears that his contact with production employees was minimal. It is, of course, true that employees knew he was the president's son. However, he was a married adult who did not live at home, and, so far as the record shows, received no special help from his father. He had no financial interest in Respondent and was not, so far as the record shows, privy to management decisions or deliberations.

The General Counsel relies on several rather neutral pieces of evidence such as the fact that Jerome attended one or two of his father's campaign speeches and that he was present with his father when the ballots were counted in the union election. I do not view this evidence as significant in showing agency status, at least insofar as attributing to Respondent the statements of Jerome Jones. The General Counsel has not alleged that Jerome's statements were violative of Section 8(a)(1). Thus, whether the employees reasonably believed that Jones was expressing management policy or were, in fact, coerced by his statements is not at issue here. Compare, *Airborne Freight Corp.*, 263 NLRB No. 181 (1982). The central issue here is whether Jerome Jones' statements were a proper reflection of Respondent's animus and motivation. I think not. Jones was merely a clerical employee; he was neither a part of management nor was the position he occupied related to labor relations. Thus, it cannot be implied that these statements reflect information to which he was privy during the normal course of his employment. Furthermore, there is no independent evidence that he was a party to, or informed of the nature of, the deliberations prior to the layoff, dealing with the union campaign or the layoff itself. Nor is there any indication that at any point Jerome Jones was taken into management's confidence.

It therefore follows that Jerome's statements could be considered reliable only because he is the son of Jerry Jones. The Board, however, has held that "family relationship is but one of the factors to be considered" in determining the existence of an

agency relationship. *Aircraft Plating Company, Inc.*, 213 NLRB 664 (1974) (emphasis added.) Thus, a simple father-son relationship, without some other indicia of managerial responsibilities or identity, is not sufficient to establish agency. See, *Byrd's Terrazzo & Tile Co.*, 227 NLRB 866, 867 (1977). I therefore find that, without more, the familial relationship of Jerome and Jerry Jones is insufficient to establish the agency of Jerome for the purpose of imputing his statements to the Respondent. Jerome's statements could have been based on speculation or on his own perceptions of unions or of the harm they might have on his father's operation. Whatever strands of evidence must be put together to determine Respondent's motivation for the layoffs, Jerome Jones' statements to employees are not, in my view, particularly reliable indicators of such motivation and I do not rely on such statements.

6. William Robinson's statement to employee Shorty

Employee Cheryl Shorty testified that she was not informed of the layoff on Sunday and, when she learned about it from other employees, called the plant. She spoke to Dorothy Jones about why she was selected for layoff. Jones indicated that it was because of her absenteeism. Shorty protested that her absenteeism had been primarily due to excused medical absences including surgery and hospitalization. Jones responded that she "was doing what she was told to do" and that, if it were up to her, Shorty would still be there. I credit this testimony of Shorty. It is compatible with the credited testimony of Lynch wherein Dorothy Jones similarly protested that she had nothing to do with the selections.

Shorty also testified that she thereafter called Personnel Director Bill Robinson to protest her selection for layoff. In the course of a long conversation with Robinson, she asked him why all the union supporters had been laid off. According to Shorty, after some hesitation and unrelated comments, Robinson did admit, "You know the reason why you was laid off. They use like a word 'economics'. . . . [W]e [were] here to help you all and we

[were] going to change things. But you all just took matters into your own hands."

Robinson denied making the comment, although he did concede that he and Shorty had a lengthy telephone conversation on December 14. This is a difficult credibility determination. Shorty seemed like an honest witness. She also seemed like the type of person who would insist on an explanation for the layoff from someone like Robinson. On the other hand, Robinson testified only about this one incident. He was not cross-examined by counsel for the General Counsel and only briefly by counsel for the Union. Although Robinson did give an unusual embellishment to some of his answers when denying he made the statements attributed to him, I am not persuaded that this makes him an unreliable witness. Moreover, I find it hard to accept the fact that Robinson would have made such an unguarded and blatantly offensive comment in view of his position and his demeanor. It is more likely that Shorty testified to what she believed had happened rather than what Robinson had said. Accordingly, I do not credit Shorty's testimony concerning her conversation with Robinson.

7. Jerry Jones' remarks in a pre-election speech

On November 25, Jerry Jones gave a prepared speech to the approximately 90 unit employees, who had been assembled in the Respondent's cafeteria. His purpose was to express opposition to their voting for union representation. The speech was composed by a member of Respondent's management staff. Its presentation was followed by a period of some 45 minutes during which Jones responded to various employee questions.[9]

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[9]Both the speech and the subsequent question-and-answer period were recorded by a management official. The tape, which contained a gap of approximately 10 minutes because Jones had recorded over and thus erased that portion, and a written transcript were submitted into evidence. The transcript was stipulated as authentic, but, thereafter, Respondent contended that there

After being greeted by restrained applause, Jones commenced reading from his prepared text. Among other things, he informed the employees that he had been told "that at least one of you went to a union meeting before you even started working here . . . [and] that at least one of you was actually a union organizer and [sic] that will soon leave the company, rather than actually intending to stay here." The first description fit employee Alyce Seay, who several weeks before, had attended a union meeting after being hired but before actually starting work. As Jones made this statement, a number of employees looked in Seay's direction.[10]

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were four statements in the transcript that were erroneous. I have carefully listened to the tape several times. Three of the four contested statements are not at crucial points in the tape. The other, which appears at page 25 of the transcript, deals with whether the word "compete" should be "fulfill" as Respondent alleges. On this point, I agree with Respondent. As Respondent has suggested, I have paid particular attention to the actual tone and manner of Jones' remarks as well as the employees' reactions thereto in order to evaluate not only the possible coercive nature of Jones' statements, but the general atmosphere of the meeting. See *Electric Motors and Specialties, Inc.*, 149 NLRB 1432, 1439 (1964).

Respondent contends that the laughter and chuckling which is audible on the tape reflects a friendly, jocular atmosphere. I disagree. Serious matters were being discussed. Employees were being addressed in a formal setting by the chief operating official of Respondent. And Jones' voice rose on several occasions. Except for a few instances where the words spoken were inherently disarming or humorous, such as Jones' reference to himself as being "ugly," much of the laughter seemed to me to be nervous laughter normally used by people to dissipate tension, particularly since the context or the words used would not normally result in laughter.

[10]Jones acknowledged that he personally inserted this particular statement into the prepared text after being given this information by either William Robinson or Yvonne Shelton, officials in the personnel office. At one point in his testimony, he denied any knowledge of the actual identity of the person, asserting that he had been informed only that it was "an employee" and that he had taken no steps to determine who this person was. At another point,

Upon the completion of his prepared remarks, Jones initiated a question-and-answer period. In response to an employee's question concerning Jones' statement in his prepared remarks about the possible freezing of wages during contract negotiations, Jones noted that such negotiations are, in most cases, "lengthy." He then added, "[A]nd I don't want to say how long this might be 'cause I don't know . . . but that means we cannot raise your salary [or] benefits . . . during that whole year." Another employee observed that an employee suggestion box might be an appropriate vehicle for improving certain unsafe conditions at Respondent's plant, adding, "I'm not no union organizer or anything like that." Jones responded that he too was concerned about safety and he further stated, "I also have another dilemma. I can close off that part of the [inaudible] and lay off some folks, too . . . You know I can hear all kinds of complaints from everybody. . . . Okay, I'm trying as best we can to offer some employment and do within. . . . [W]e can get into hassles about all kinds of things all the time and I think the Company tries to do its best about them. . . . [I]f you have some real concerns . . . you tell me."

Thereafter, an employee commented that Jones often appeared in the work areas "look[ing] mean." Jones began his response in a light hearted vein, noting that perhaps he was "just ugly." He then observed, "We're not making our production goals." At this point, the employees began to protest and Jones interjected "Hey, wait a minute, let me tell you some other things about it -- there's some other things you should think about. Although we're not doing and most companies probably would have had some layoffs . . . we have kept everybody. On the other hand, you got to understand it puts me under a lot of pressure, because I'm paying you and I shouldn't." In connection with Jones' observation that

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however, he testified: "Later on I found out that the person that I was referring to here was somebody else," thus indicating that he did have someone in mind when he made this statement. Jones' testimony on this point was contradictory and evasive.

the employees were not meeting production goals, one person noted that the employees were often forced to work without proper tools and equipment. Jones admitted that this was true, but added, "Now the one thing that you know, you should know and I can't promise this will last forever, but you have not been laid off as a result of it and nothing else, okay? . . . [Y]ou got to look at the benefits as well as the problems." Later on, an employee complained about being assigned to tasks other than those for which she had been hired. William Robinson attempted to explain that this was due to "things [being] really slow." Jones then interrupted, "[M]aybe we're going about things the wrong way," and added, "Maybe people would rather go home." Jones also said that he was doing what he thought he would like "people to do to me" and concluded, "I mean if that's not what you want, we can do it differently, you know"

In response to another question Jones stated that he was more concerned about his competitors than about the Union. However, in the course of his answer, he told the employees that they had to put what he had said before "in perspective" and discussed the impact of a union victory. He said that the employees were "gonna probably, if [the Union] get[s] in, suffer more than the Company." He then explained that he currently moved employees from their normally assigned jobs to others when work was slow. However, if the Union were selected, he would "have to ask the Union if I can move you from here to here. I don't want to get into that. On the other hand, if you don't mind going home, maybe we should -- you know. Because that's what [it] would mean probably what will have to happen."

Thereafter, in answer to a question about whether Jones would have given the employees more benefits if he was able, Jones stated that Respondent had lost money in the past but that "now we're trying to come back and you said you may think things are really great . . . [.] The Company is making money hand over fist, let me tell you the reason is that I went out and borrowed some money that I got to pay back. . . . That's why you see something like that happening because I'm trying to get things so that we

can create some more jobs -- so we can do some more things." Continuing to respond to the question of whether he would grant benefits, Jones stated as follows:

> I may not if there's a union. And the reason is simple. OK? I don't -- if you decide that you want the Union representing you, then you don't need me. I'm going to fight everything, the law, everything as much as I can. You don't need me anymore. You said I want this man here to represent me. Well, let him get for you what he can get. I'm not going to offer you anything, alright, cause you already said, hey, I want him to do it, so let him do it. OK. It's that simple and I'm gonna tell you. I'm gonna take as hard a line - I'm gonna fight every bit I can, cause I've already told you, you know, and we don't have no misunderstanding about it.

The General Counsel and the Union contend that the aforementioned statements made by Jones included threats of reprisal for choosing union representation and remarks which created the impression that the employees' union activities were under surveillance, all in violation of Section 8(a)(1) of the Act. Respondent essentially disputes that any of these statements amounted to a violation.

Alleged Impression of Surveillance

Jones' statement that "he had been told" that an employee had attended a union meeting prior to starting work with the Respondent and that another was a "union organizer" created the impression that the employees' union activities were under surveillance by Respondent and thus violated Section 8(a)(1). All union meetings were held away from Respondent's premises. Thus, absent some explanation by Jones as to the source of this information, it would be reasonable for the employees to assume that their union activities were being monitored by the Respondent. See, *Redwing Carriers, Inc.*, 216 NLRB 530, 536 (1976). The coercive effect of these statements was demonstrated by

some employees' looking at one specific employee and by the express disclaimer of union activity mentioned by a subsequent employee questioner.

Alleged Threats of Reprisal

It is alleged that Jones threatened to lay off employees and take other reprisals if the Union won the election. On several occasions during the question-and-answer period Jones referred to the fact that he had avoided layoffs in the past, but that such layoffs were possible if Respondent's position on safety, job assignments and production were not followed. However, Jones' statements came in response to questions by employees complaining about the Respondent's position on these subjects. Jones simply stated that the employees had a choice of being laid off or working in the allegedly unsafe conditions, accepting different assignments and increasing production. In short, Jones was taking a hard economic line in response to their complaints. He was saying, in effect, "take the jobs as they are." There was little if any reference to the Union in Jones' remarks in this respect and I do not find anything unlawful in most of his responses to employee questions even though they may have contained references to the possibility of a layoff.

In two instances, however, Jones' remarks did relate rather specifically to the Union and what he would or would not do with respect to employee benefits and working conditions in response to the Union. In these instances, Jones crossed the line between lawful and unlawful comment. The first was Jones' statement that the employees "would suffer" more than Respondent if the Union won representation rights. He explained that he currently moved employees from job to job when work was slow, but that he did not want to talk with the Union before doing so, and, therefore, "if you don't mind going home, maybe we should -- you know. Because that's what [it] would mean probably what will have to happen." A fair reading of these remarks is that, if the Union were selected, the employees would "suffer" and lose benefits --

for example, the ability to work in slow periods -- which they enjoyed in a nonunion environment.

The second instance was Jones' statement in response to questions relating to employee benefits. It was clear that both the questioner and Jones were talking about benefits Jones could afford. He specifically told employees that he "may not" grant benefits "if there's a union." He followed this remark by stating, "[I]f you decide that you want the Union representing you then you don't need me . . . You said I want this man here to represent me. Well, let him get for you what he can get. I'm not going to offer you anything, all right, cause you already said . . . I want him to do it, so let him do it. . . ." A fair reading of these remarks is that Jones threatened that he would not grant unspecified benefits to employees if the Union won representation rights.

Jones' observation that the employees would suffer more than the Company if the Union prevailed, combined with his explanation that he would then no longer be able to move employees from their normally assigned jobs when work was slow, thus resulting in their being sent home, as well as his statement that he might not, if the Union were elected, grant employees those benefits he could afford amounted to improper threats of retaliation and thus violated Section 8(a)(1). Jones' statements, which suggested detrimental treatment of employees, were neither couched in, nor based on, reasonably objective facts which were beyond his control. Rather, Jones made it clear that the forthcoming consequences would be the product of his own action, taken as a result of a union election victory. As such, the statements were overt threats of retaliation, and thus violative of the Act. See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969). Furthermore, the fact that they were made in response to employee inquiries or observations at a meeting whose sole purpose was to permit Jones to express his opposition to unionization is of crucial import. In *Gissel*, *supra*, the Supreme Court made clear that, in analyzing the coercive impact of employer statements, the Board must focus on "[W]hat did the

speaker intend and the listener understand?" *Id.* at 619. Accord: *N.L.R.B. v. Federbush*, 121 F.2d 954, 957 (C.A. 2, 1941) (L. Hand). The Court also observed, in *Gissel*, that an employer who has control over the employer-employee relationship "and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in 'brinkmanship' when it becomes all too easy to 'overstep and tumble [over] the brink,' *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (C.A. 7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees." *Id.* at 620. Jones' remarks did not meet the test of *Gissel* for protected speech.[11]

8. Dorothy Jones' February 1982 statements to employees Henry and Lynch

Employee Eva Henry was among the employees recalled in February of 1982. Upon her return to work she had a conversation with Dorothy Jones. Jones asked Henry how Weader Lynch, Henry's friend, was doing. Henry replied that Lynch was

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[11]It is unclear whether it is alleged that other parts of Jones' statements are unlawful because neither the General Counsel's nor the Union's brief is a model of clarity on this point. For example, there is a reference in the General Counsel's brief about Jones' failure explicitly to deny a rumor which was brought to his attention by an employee who asked if it were true, as rumored, that Respondent would close the plant if the Union won the election. In its brief, the Respondent answers an anticipated argument by asserting that Jones' remarks in this respect were not improper. I am uncertain as to whether this issue is before me, but, assuming it is, I find no violation. It is open to inference that Jones, who reacted to the question by saying that it put him on the spot, did not go out of his way to put the rumor to rest as he should have. However, the thrust of his response seemed to be that he had so much invested in the operation that he would not close it down. I think the employees would reasonably have understood this to have been his intended response. Accordingly, I do not find that Jones' response to the question dealing with the rumored plant shutdown was unlawful.

fine and asked when she would be recalled. Jones replied that she "needed help" and that she had "submitted Weader's name" several times "to come back to work." Several days later, Henry again asked Jones when Lynch would be returning to work. Jones shook her head and replied that Lynch, "wasn't coming back." When Henry asked why, Jones replied that Lynch was on a "no-no list." Henry relayed this information to Lynch.

On or about February 17, 1982, Lynch called Jones to verify the information. Lynch asked Jones "if there was a list." Jones replied that "there were two lists, one of people who would come back and one of people who would not come back." Jones admitted that she had submitted Lynch's name "to the office" but that her superiors had overruled her. Jones also stated that she had discussed Lynch's possible recall with Willie Taylor, and that Taylor had told Jones that Respondent "had received phone calls" about Lynch's participation "in union activities." Jones told Lynch that she had also discussed Lynch with Assistant Personnel Administrator Yolanda Shelton. Shelton told Jones that "Jerry Jones' lawyer had advised [Respondent] against calling [Lynch] back because she was a troublemaker and affiliated with the Union." Jones argued that Lynch's "work performance and conduct at work was good" and that her union activities shouldn't be held against her, but Shelton replied that "she had nothing to do with it" and "was doing what she was told."

A few days later, Lynch called Shelton. She asked what criteria had been used to select employees for retention and recall. Shelton replied that flexibility was the primary factor. Lynch explained that she had been a group leader and, as such, was one of Respondent's most flexible employees. Shelton replied that she knew that but that Respondent, at that time, did not need any group leaders. Lynch asked to return to work as a "line girl," a regular employee. Shelton said that she would have to talk to Personnel Manager Bill Robinson. Shortly thereafter, Lynch called Robinson. He told her that the recall decision was that of Dorothy Jones and Willie Taylor. Lynch told him that she had already spoken with Jones and that Jones had no objection to her

recall and had, in fact, already submitted her name for recall. Robinson told Lynch that he would "get back to her." Robinson, however, never contacted Lynch.

The above was based on the testimony of Lynch and Henry whom I credit on this issue. Their testimony was credited in a previous portion of this decision and it meshed on this issue. Jones conceded that she talked to both employees and that she had indeed recommended that Lynch be recalled. This tends to support Lynch's testimony. Moreover, I have discussed at length in a previous part of this Decision the reasons why Jones did not impress me as a reliable witness. There is no reason to treat her testimony about this issue as having any greater reliability. For example, Jones testified that Lynch asked no question about the fact that she was not recalled. However, in view of Lynch's position as a group leader, I believe that she would have questioned Jones on this matter. The undisputed fact that Lynch then called Shelton and Bill Robinson, seeking recall, supports the view that Lynch pressed the matter of her reemployment. I also credit Lynch's testimony that she was willing to return to work as a regular employee as her friend Eva Henry had done. This is confirmed by her determined effort to get reemployed, and, indeed, she was eventually reemployed as a rank-and-file employee.

In accordance with my credibility determination, I find that Jones' statements to Lynch and Henry reflect Respondent's union animus with respect to both the reason for the original layoff and the subsequent recalls.

C. Analysis of the Alleged Discriminatory Mass Layoff

The timing of the layoffs strongly supports a finding of discrimination. The layoffs were decided upon over the weekend immediately after the Board election. The announcement that the Union had won the election was made near the end of the workday on Friday. The employees were called at home on Sunday and told not to report for work on Monday. President

Jerry Jones did not even await a written report of an inventory taken on Saturday which allegedly caused him to decide that employees had to be laid off. He acted only on a verbal report from Materials Manager Irene Glatter. And, except for one person, Respondent limited its layoff to production employees who voted in the union election despite the fact that it employed an equal number of office and engineering employees. No supervisors were affected. Thus, by the next working day after the election results were announced, Respondent had effectuated an "indefinite" layoff of over 50 percent of the employees in the election unit.[12]

Respondent's animus against the Union had been expressed on several occasions prior to the election and unfair labor practices were committed by various supervisors. Supervisor Denson threatened the very action which took place -- a layoff -- if the Union won the election. The day after the layoffs, Production Supervisor Freeman admitted that they had taken place in part because "the Union came in." In a pre-election meeting with employees, President Jerry Jones made two unlawful threats of loss of benefits if the employees selected the Union. One of those benefits mentioned by Jones was the ability of employees to work during slow periods. His statement that employees would "suffer" more than Respondent if the Union won the election proved prophetic. In addition, Supervisor Dorothy Jones told employee Weader Lynch that Respondent had found out about a victory celebration among union supporters after the election results were announced, that Jones was upset about the union victory and that he said that those employees would not be coming back to work. This shows that Respondent was interested in retaliating against the celebrants -- all of whom were laid off -- because of the election results. Indeed, not only did the layoff reach all of the union victory celebrants but it also reached all of

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[12]The precipitous nature of the layoffs is also shown by the rather immediate recall, within days, of about 7 employees and the recall of another 13 employees in February. These recalls are discussed in the next section of this Decision.

the union election observers. As shown elsewhere in this Decision, there is evidence that Respondent discriminatorily selected a number of these employees for layoff, including two highly regarded group leaders, Eva Henry and Weader Lynch. This evidence gives meaning to the timing and the number of the layoffs and demonstrates a prima facie showing of discriminatory motive.

In the face of this evidence, Respondent has failed to show that the layoff -- in such numbers and with such alacrity -- would have taken place absent the selection of the Union by the employees. Respondent's defense, based primarily on the testimony of Jerry Jones, is as follows: At the beginning of December 1981, Jones learned that an official of Respondent's bank had called about overdrafts in two of its bank accounts. On December 3, 1981, Jones also learned that there was an accumulation of nearly completed products and requested an immediate inventory. Apparently there were many products that were not ready for shipment either because they had defective parts or because there was a shortage of parts necessary for their completion. Jones decided that the weekly scrap report he utilized was inadequate and he directed that a new reporting system be instituted to better inform him of the status of his inventory. According to Jones, shipping completed products would alleviate an alleged cash flow problem because Respondent was paid when products were shipped. From December 3 to December 11, Respondent was able to cover the overdrafts, and, on December 12, the day after the election, an inventory was finally taken. According to Jones, on the day of the inventory, he received a verbal report which revealed that $ 700,000 worth of products could be completed in short order and shipped. As a result, Jones decided that he would stop building new subassemblies and simply complete those that were almost ready for shipment. He therefore decided to lay off over 50 percent of his production work force. He implemented this decision on Sunday by calling in his front-line supervisors, having them decide which employees to retain and having them notify those who were to be laid off.

Jones, amplified in part by Secretary-Treasurer Barbara Birthwright, Materials Manager Irene Glatter and Production Manager Willie Taylor, suggested that certain parts problems and the inability to pay vendors contributed to the Respondent's decision to lay off employees. I found these suggestions unpersuasive. The evidence is overwhelming that parts problems had plagued Respondent since at least October of 1981. Respondent's own witnesses testified to this effect and documentary evidence shows that Respondent had not met its production goals on the products that had parts problems attributed to them. These parts problems were discussed at weekly production meetings and no personnel reductions were undertaken as a result. Indeed, Jones testified that, in the past, he had always dismissed the option of a layoff "because we don't like to have layoffs and we generally try to avoid layoffs." This was also the thrust of some of his remarks to employees in the November 25 pre-election meeting.

Likewise unpersuasive is the suggestion that an unusual inability to pay vendors was a motivating factor in the layoffs. Barbara Birthwright's testimony concerning such difficulties is belied by documentary evidence. Monthly reports submitted by Respondent to its bank show that Respondent's accounts payable were lower in December than they had been for some 5 months and they were also lower than the first 2 months of 1982. And its net sales and gross profits remained relatively constant during this period. Both Birthwright and Glatter testified concerning a threat from a vendor against Glatter's life if he was not paid. But when Jones found out about the threat, he directed that the vendor be paid immediately and he was. It is hard to see how this incident in and of itself was indicative of a serious cash flow problem or forced the layoff of employees.

Stripped of the above subsidiary contentions, Respondent's defense is basically that two problems, surplus inventory, particularly in nearly finished products, and cash flow difficulties combined to cause it to decide to lay off half its production workers. And, as Respondent pointed out in one of its briefs -- although identifying the inventory problem as a parts problem: "If

one of these factors had been present without the other, as had occurred to a lesser extent in times past, perhaps a layoff might not have been necessary." An analysis of Respondent's defense, however, reveals nothing that would have required the layoff of such a great number of employees on such short notice in the absence of the Union's election victory and thus it fails to overcome the General Counsel's prima facie case of discrimination.

I turn first to the inventory problem. An essential ingredient of Jones' rationale for the layoffs rests on his testimony -- and that of Birthwright and Glatter -- concerning their consultations on December 3, 1981, a date some 8 days before the union election, when, according to Jones, the inventory problems first caused him some concern. However, an analysis of Jones' testimony reveals serious flaws and inconsistencies that reflect adversely on his credibility and ultimately weaken Respondent's explanation for the layoff.

Jones testified that in a December 3 meeting between him, Glatter and Birthwright, Birthwright suggested laying off employees, and that he took the decision under advisement. Later, he testified that both Birthwright and Glatter had mentioned a layoff "several times prior" to the December 12 meeting in which he made the final decision to effectuate a layoff. The suggestion here was that layoffs were considered well before the union election as a component of Respondent's economic problems. However, neither Glatter nor Birthwright supported Jones on this point even though they testified about their December 3 meeting with Jones and at length about their concerns over cash flow and inventory problems prior to December 12. Both Birthwright and Glatter testified to having had separate meetings with Jones on December 3 and Birthwright specifically testified that she could not remember making any recommendations to Jones on December 3. Similarly, Glatter's testimony indicates that the first mention of layoffs was made by Birthwright at the December 12 meeting. Thus, Jones was not corroborated and indeed contradict-

ed in his attempt to show that his pre-election deliberations with Birthwright and Glatter specifically dealt with layoffs.

A second major conflict revolves around the December 3 request by Jones that an inventory be taken. Jones testified that on this date he was told by Birthwright and Glatter that the earliest an inventory could be taken was on December 12. The suggestion here was that the specific date for the inventory was decided well before the election results were known and that it was keyed to a concern over an accumulation of inventory. However, neither Glatter nor Birthwright support Jones on this point. Glatter testified that, on December 3, she did not mention a specific day for the inventory. Nor did Birthwright, in her testimony about the December 3 meeting, mention a specific day for the inventory. Indeed, both Birthwright and Glatter testified rather clearly that the specific date for the inventory was decided some 2 days before December 12, when it was actually taken.

A third incongruity in Jones' testimony about the December 3 meeting deals with his own reaction to his tour of the production floor on that date. He testified that he discovered a great number of completed sub-assemblies with defective parts; he estimated that there were a "couple hundred thousand dollars worth of completed units." He then told Birthwright and Glatter that he wanted a new reporting system which would give him a "better feel for the total amount of materials on the floor" and that the so-called scrap report that he received weekly was inadequate. Indeed, Jones testified that he was extremely annoyed by the inadequacy of the reporting system and that he brought it to the attention of Birthwright and Glatter in such a manner that they were "almost in tears." Yet there is scant evidence that the reporting system was ever changed or augmented. Jones later testified that, as of the time of his testimony in April of 1983, a new reporting system was "undergoing change now." Apparently, only part of the new report was prepared, and, as of April 1983, he had seen only one or two such reports. None was produced at the hearing. However, Jones was still receiving the weekly scrap report which, in December of 1981, he had told Glatter and

Birthwright to change or augment. Thus, early in his testimony, Jones clearly stated that he needed a new reporting system to help him decide how much inventory he had on hand so that he knew "what goes out from the store room." Yet, after a year and one half, he still did not have such a system in effect. This renders suspect Jones' alleged concern over the accumulation of inventory. Had he been truly concerned about this problem he would have implemented the changes he suggested in December of 1981. Indeed, his lack of concern, or even explanation, for his failure to follow through on this new reporting system contrasts sharply with his precipitous layoff decision, which was allegedly based on inventory problems.

Several other factors render unpersuasive Respondent's economic justification based on the accumulation of inventory. First of all, a full formal inventory is normally taken in May of each year by Irene Glatter and her staff. She had taken such an inventory in May of 1981. Jones allegedly directed an inventory to be taken on December 3, 1981. It was not taken until December 12, the day after the election, and Jones did not await the written inventory report from Glatter. He acted only on her verbal report before effectuating the layoff on Sunday, even though Glatter informed him that her verbal report "was based solely on what I'd seen" and she would follow it up with a "precise" report on Monday, the next working day. Secondly, Jones initially suggested that he was concerned that he get the completed sub-assemblies on the production floor ready for shipment because this was the only way he could get paid. Later, it became apparent that Respondent, essentially a government contractor, was able to obtain payments from the Federal Government -- in the form of progress payments and advance payments -- during the production process even before shipment. Respondent was apparently able to cover its overdraft situation in early December with such payments. Birthwright testified that she covered the payroll account overdraft in December 1981 by contacting the Department of Defense and obtaining a progress payment in the amount of about $ 117,000.

Thirdly, and perhaps most importantly, the so-called inventory problem was not apparent in the documentary evidence. In materials prepared by a certified public accountant and introduced into evidence in this proceeding, a large, rather stable, inventory figure appears from the end of September 1981 through the end of March 1982. There was a slight decrease of about 4 percent in December but a much greater decrease in inventory -- about 45 percent -- took place in April of 1982. No unusual personnel decisions were undertaken in April and indeed employees had been recalled in February. Thus, not only was there no significant accumulation of inventory in December of 1981, but it does not appear that there is any discernible relationship between the inventory figures in the documentary evidence and employment. This evidence, which was submitted by Respondent, shows that there was not an unusual inventory problem at the time of the layoffs.

I turn now to the Respondent's cash flow situation. According to Jones, there was a cash flow problem in December of 1981 and this contributed to his decision to lay off half of his production employees. The evidence, however, fails to show that the alleged cash flow problem in December 1981 was significantly different from the cash flow problems Respondent had experienced in the past.

Cash flow analysis statements prepared by an independent public accountant from Respondent's books and records were placed into evidence by the Respondent itself. These statements relate only to the Respondent's regular bank account,[13] but they show that Respondent had a negative cash flow position in that account almost continuously from June 1980 through December 1981. Indeed, even after December 1981, Respondent continued to suffer deficit daily balances in its regular account. The pattern shown by this documentary evidence, Respondent's

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[13]In some of the testimony and the documentary evidence this account is also referred to as the general account.

Exhibit 51, is that, on various days throughout the 2-year history covered by the evidence, Respondent was in a negative position in its regular account, but it was able to cover its deficits by intermittent or periodic infusions of cash.[14]

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[14]Respondent was in a negative cash position in its regular account each and every day from January 1, 1980, through May 29, 1980. Thereafter, the figures are as follows:

Month/Year	Number of days in negative position
June 1980	19
July 1980	24
August 1980	25
September 1980	24
October 1980	24
December 1980	2
January 1981	24
February 1981	21
March 1981	21
April 1981	8
May 1981	21
June 1981	27
July 1981	15
August 1981	17
September 1981	25
October 198	18
November 1981	30
December 1981	20
January 1982	18
February 1982	2
March 1982	3
April 1982	11
May 1982	2
June 1982	18
July 1982	21
August 1982	13
September 1982	12
October 1982	2
November 1982	11
December 1982	13

Other evidence confirms that the Respondent's cash situation as reflected in its regular account at the time of the layoff was no worse than it was in the past. Barbara Birthwright testified that Respondent's regular bank account was in an overdraft position on the books more than 50 percent of the time in October and November 1981 and at least 25 percent of the time at the bank. Documentary evidence bears this out. Respondent's Exhibit 51 shows that, in the month of November, Respondent was in a deficit position on every single day, up to a maximum of over a quarter of a million dollars at the end of the day on November 11. In December 1981, Respondent was in a less severe deficit position, and, indeed, had, by virtue of an infusion of receipts of some $213,000 on December 4, managed to get the regular account into a positive cash position. Reference to Respondent's bank statements for the regular account confirms this view. Respondent had been in an overdraft position at the bank on November 6, 9, 10, 12, 24, 25, 27 and 30, 1981. Respondent's bank statements also show overdrafts in October of 1981 and in other months both in 1980 and 1981. However, the bank statements show that Respondent's regular bank account, if anything, was in better shape at the time of the layoff than it was in the past. Thus, Respondent was in an overdraft position for the first 3 days of December, but on December 4, after two large credits, the regular bank account was in surplus where it remained throughout December. On the last banking day before the layoff -- December 11, 1981 -- Respondent had a surplus at the bank of some $ 23,000 in its regular account.

Despite the evidence of deficits and overdrafts in the regular account both in November 1981 and in earlier periods, which appeared to be worse than those existing at the time of the layoff, there is no evidence that Respondent considered layoffs as a result of such deficits and overdrafts. This renders unpersuasive Respondent's reliance on whatever difficulties were present in the regular account in early December to effectuate the layoff

on December 13. Those difficulties had been resolved about a week before by an infusion of cash into the regular account.[15]

Even more significant, however, is the fact that Respondent's regular account, which was almost continuously in a negative position, and its payroll account do not give the complete picture of Respondent's cash flow situation. Respondent had numerous other bank and cash accounts. There was no evidence that these other bank accounts were in an overdraft position at the bank or in a deficit position on the books. Indeed, documentary evidence submitted to Respondent's bank on a monthly basis showed that the cash on hand from all accounts was in a positive or surplus position at all times throughout 1981 and 1982. From January 1980 to December 1982, Respondent's overall cash account was in a negative position only once -- in March 1980. An analysis of these documents, which have some inherent reliability because they were provided monthly to Respondent's bank as required by its loan agreement, fail to show a significant overall cash flow problem.[16]

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[15]Jones also referred to overdrafts in Respondent's payroll account. Checks are apparently drawn on that account and covered by a deposit from the regular account every 2 weeks. That account was in overdraft briefly twice in December of 1981. The overdrafts were covered within short order through an infusion of cash. It appears that the payroll account serves as a clearing account and that the status of the payroll account is ultimately reflected in the status of the regular account. Respondent focused, in its defense, on the precariousness of its regular account, and the only bank statement relating to the payroll account submitted by Respondent was that for December 1981.

[16]These documents also show that Respondent's net worth position improved significantly throughout 1981, even though it continued to be in a negative position until July 1982, after it received a $700,000 payment from a claim it had against the United States, a claim which it had used to secure a loan of about half a million dollars in July of 1981. Also, Respondent's gross profits and net income were in a positive position throughout 1981, although by the end of 1981 its net income had dipped.

It is true that most of the Respondent's other bank accounts, which were in surplus, were restricted, that is, their monies could be used only to pay expenses on certain contracts and the checks had to be approved or countersigned by a Government official.[17] Yet it is clear that funds from these accounts or revenues from these accounts or from other sources were available to Respondent because it was able to cover overdrafts by drawing upon them. In other words, whether one focuses on the overdrafts at different periods since June 1980 or simply in the months of November and December 1981, Respondent was able to, and did, come up with the cash to cover its overdrafts. It is obvious that these funds were made available to Respondent by the United States either from progress or advance payments on existing contracts or they came from the surpluses in the restricted accounts. The pattern of Respondent's operations, as I have perceived it by analyzing the documentary evidence, is that its infusion of revenue from government contracts was intermittent and irregular. At times, the regular account or the payroll account may have been low or even in deficit or overdraft, but Respondent's overall cash position was not in deficit and it was not in deficit in November or December 1981.

Jones' testimony concerning the severity of cash flow problems in December of 1981 is thus refuted by the documentary evidence. Moreover, his testimony on this aspect of the case does not really address the substance of the cash flow situation. He simply testified that his banker told him that no more overdrafts would be permitted. Jones admitted that he had been warned by his banker about overdrafts "at various times during our company's association with the bank." He had even had an entire payroll returned in the past -- a situation that did not occur in December of 1981. However, Jones testified that the December 1 call from his banker was different from past warnings since it

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[17] According to documentary evidence, Respondent had a total of 12 cash accounts. Four were unrestricted. Of the eight restricted accounts one covered J-boxes and another covered amplifiers; others covered specific job numbers.

raised fears that the bank was "taking action that might close us down." He also suggested that the bank might withdraw or terminate its loan agreement and cause Respondent to "go out of business." I consider this testimony exaggerated. There was no evidence to support Jones' testimony that Respondent's loan agreement was in jeopardy of being terminated. And the documentary evidence on Respondent's cash flow position refutes the suggestion that the bank's decision to stop overdrafts in Respondent's unrestricted accounts had the impact that Jones mentioned in his testimony. Nor is Jones' testimony supported by other evidence. Jones testified that he asked another official of Respondent, a Judge Watt, to intercede with the bank. But it is unclear what if anything happened as a result. Neither Watt nor the banker was called to testify. There was no documentary evidence to show that the December 1 call from the banker involved any particular sanction. And there is no evidence that this particular problem required the layoff of employees. In short, Jones' testimony shows that he was warned by his banker to avoid overdrafts in the future, but this testimony does not establish that Respondent had a cash flow problem that required the layoff of over half of its production workers.

Nor does the decision to lay off such a large number of employees on such short notice make sense in view of other evidence in this case which suggests that Respondent believed it had a sound financial future. In October of 1981, Respondent hired a significant number of new employees, and, in December of 1981, it was working on an amended proposal for a large government contract, which it later obtained. In addition, at the time of the layoffs, Respondent had a one million dollar claim against the United States -- $700,000 of which was realized in July 1982. And, in the summer of 1981, Respondent had agreed to a new lease for additional space for its production facilities.[18]

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[18]On July 1, 1981, Respondent agreed to a new lease for additional space for its production facilities at the 95th Street building. The lease, which was to terminate on January 31, 1984, consisted of three phases. During the first phase,

Finally, on December 7, just several days before the election and the layoff, Respondent instituted wage increases for 64 of the 92 unit employees.[19] These raises ranged from 11 to 55 cents per hour. Respondent thus had a fundamental soundness which, together with the complete failure of support for its inventory and cash flow defense, makes it highly unlikely that it would have laid off such a great number of employees on such short notice under ordinary circumstances.

In analyzing all of the evidence, I believe that Respondent has failed to prove, in response to the General Counsel's showing of discriminatory motivation, that it would have laid off indefinitely over 50 percent of its production employees in the absence of the Union's election victory on December 11. The evidence does not show a severe problem either in inventory or in cash flow that would justify such a precipitous and far reaching layoff. Thus, the entire mass layoff was unlawful without regard to whether individual employees were known or suspected union advocates. See *N.L.R.B. v. Link Belt Co.*, 311 U.S. 584, 602 (1941); *Majestic Molded Products Inc. v. N.L.R.B.*, 330 F.2d 603, 606 (C.A. 2,

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which commenced on July 1, Respondent was to occupy 16,080 square feet of the building at a cost of $2680 per month. During the second phase, beginning October 1, Respondent was to occupy an additional 20,554 square feet at a total rent of $6106 per month. And during the final phase, which was to commence no later than April 1, 1982, Respondent was to occupy the entire building, 60,125 square feet, at a total rent of $10,020.83 per month. Thus, Respondent chose to assume a significant, progressive, long-term obligation, presumably based on existing and projected government contracts. Indeed, the evidence indicates that Respondent honored its payment commitment under the lease even though it did not expand its operation from the original 16,080 square feet until sometime in 1982.

[19]Of the remaining 28, 18 had received increases in September, October or November of 1981. Thus, 82 members of the unit had received increases within 3 months of the layoff.

1964); *N.L.R.B. v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (C.A. 7, 1981).[20]

D. Analysis of the Alleged Discriminatory Selection of Union Adherents for Layoff and Recall

The General Counsel alleges that individual employees were discriminatorily selected for layoff and discriminatorily denied recall, even assuming that the Respondent had a valid economic reason for the general layoff. Although I have found the general layoff unlawful, I shall make additional findings under the selection theory which was fully litigated at the hearing. In this connection, I dismissed some 31 employees from the selection theory aspect of the Complaint at the conclusion of the General Counsel's case because a *prima facie* case of a violation was not made out.

Of the remaining 19 alleged discriminatees, 5 engaged in few, if any, union activities which would have targeted them for discriminatory treatment. Thus, Karen Adams' only apparent union activity was her attendance at the first general union meeting. The only activity of Marcia Staine and Johnnie Murphy was their attendance at the general union meetings. The General Counsel cites evidence that Supervisor Cora Robinson told employee Eva Henry that she had heard that Beeks was a union organizer. However, neither Beeks nor the other employees mentioned above testified in this proceeding and there is no evidence that they even signed cards. Another employee, Mary Durham, did testify, but her union activities were limited. She attended one union meeting and took literature from union

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[20]While the Respondent correctly asserts that those employees retained after the layoff may have included some union supporters, this does not detract from the finding that the decision to lay off employees en masse was discriminatorily motivated. For "it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 424 (C.A. 7, 1964).

officials outside the plant at a time when, as Durham testified, no official of Respondent was present. Based on the limited evidence of union activity offered above, I cannot conclude that the General Counsel has made out a *prima facie* case that Respondent discriminatorily selected these employees for layoff because of their union activities.

Three other employees, Frank Nissen, Cheryl Shorty and Linda Berryhill, participated to a somewhat greater degree in the union campaign. Shorty signed a union authorization card and attended some organizing committee meetings. However, there is no evidence that Respondent's officials talked to her about the Union or mentioned her name to other employees in connection with union activities. Berryhill also signed a union card. The General Counsel alleges that she "spoke up" during Jones' November 25 meeting with employees. However, there is nothing in her remarks or those of Jones that would have identified her as a union supporter. She simply complained about certain working conditions and she disclaimed being a "union organizer." In Nissen's case, the General Counsel offers no direct evidence. Nissen did not testify and he was not identified as having engaged in any union activity. The General Counsel contends, however, that Respondent alleged, in its exceptions to the Regional Director's Report on Objections to Election, that Nissen was an agent of the Union. This was based on employee affidavits obtained by the Regional Director during his investigation *after* the election. I do not consider the evidence described above to be sufficient to establish a *prima facie* case that Respondent discriminatorily selected Shorty, Berryhill and Nissen for layoff because of their union activities.

As to the 11 remaining alleged discriminatees under the so-called selection theory, there is sufficient and compelling evidence that they were known or suspected union leaders and that they were singled out for discriminatory treatment. Three, Lula Armstrong, Ernest Barlow and Marion Sherron, were the Union's election observers. Most were organizing committee members and Armstrong, Barlow, Eva Henry, Weader Lynch, Annette

Payne, Alyce Seay, Bernice Wells and Helen Woodard attended the Union's victory celebration. Dorothy Jones stated that news of this celebration reached Jerry Jones and that he expressed the view that the participants would not be working for Respondent. Henry, Lynch and Oliver Harper were subjects of unfair labor practices by Respondent's supervisors in circumstances which showed that they were known or suspected union supporters. Seay was identified during a meeting by President Jones. James Lewis, who had signed a union card and attended both general and committee meetings, was identified by Dorothy Jones as one whose union activities were being watched. Jones also stated that there was a list being kept of union supporters, that Lynch, for one, was on that list, and that she would not be recalled because of her union activities. In view of Respondent's other unfair labor practices, its expressed union animus and the timing of the layoffs immediately after the Union's election victory, the above evidence sufficiently establishes that -- at least *prima facie* -- these 11 leading union employees were discriminatorily selected for layoff and were not recalled from layoff for the same discriminatory reason, even assuming that Respondent's economic defense would have supported the layoff of some employees.

Respondent's explanations for the selection of the union adherents for layoff are based essentially on the testimony of Supervisors Denson, Robinson and Dorothy Jones. I note that Respondent's witnesses testified that several criteria were used to retain employees: competence, experience, productivity, flexibility and attendance. Useful to the analysis of this issue is the fact that certain employee performance reviews or evaluations -- most of them prepared shortly before the layoff in early December of 1981 -- were introduced into evidence. These evaluations reflected the breadth of experience of its employees and their competence, in an objective setting -- prior to the layoffs.[21] I therefore place greater emphasis on these documents than I do

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[21]Cora Robinson testified that she went over the performance reviews of the employees under her supervision before making her selections for layoff.

on the testimony of Denson, Robinson and Dorothy Jones, whose testimony was shown to be unreliable in other parts of this Decision and whose testimony on the selection of particular employees was often conclusory and occasionally inconsistent. Based on my consideration of all of the evidence, including the demeanor of the witnesses, I find that most of the 11 employees were the specific objects of discrimination: 8 were improperly selected for layoff; and 10 were improperly denied recall.

I turn first to employees Barlow and Harper who were supervised by Denson. They were among the six or seven employees in the machine shop, which was located at the 95th Street facility. Barlow was a machine operator who had been employed since May 7, 1980. He was highly regarded. In August of 1981, he was promoted to utility man by Denson with an increase in pay, effective September 1, of about 20 percent. Harper had been hired on September 3, 1981, and he received a "good" evaluation on December 8, 1981. Both men were active in the union campaign, but Barlow was more of a leader since he passed out union cards, talked about the Union and acted as an election observer.

Several employees were retained in Denson's department: silk screener Thelma Cotton and machine operators Bertram Hayes and Warren McCullum, as well as Johnnie Pullum, who had been on sick leave since November 9, 1981. Hayes was clearly a more experienced and valued employee than Barlow. However, both McCullum and Pullum had barely more seniority than Barlow -- actually, by virtue of his loss of time because of sick leave, Pullum had less overall experience - and they would not likely have been retained over Barlow under ordinary circumstances. In Barlow's last evaluation, Denson listed his attendance record as "excellent" and noted that he worked "well without supervision." Of course, Barlow had been promoted to utility man in September with a substantial raise. McCullum had an attendance problem that led to his discharge in June of 1982. He was earning a dollar an hour less than Barlow at the time of the layoffs, a figure that clearly and objectively shows the relative value of the two men

prior to the layoff. Pullum was making 37 cents per hour less than Barlow, and, not only was he on sick leave at the time of the layoff, but it is clear that his was a terminal illness. He returned to work in February of 1982 for about 3 weeks. He died shortly after completing this 3-week stint. Indeed, Barlow was so flexible -- he did spray painting and coated PC boards -- that it is possible that he would have been retained even over Cotton if non-discriminatory reasons had been utilized in the layoff selections. In any event, he clearly was superior to McCullum and Pullum. Based on the above analysis of objective evidence, I cannot accept Denson's testimony that he selected Barlow for layoff because of his lesser seniority and lack of flexibility. In addition, as I have indicated earlier, Denson's testimony on the very issue of Barlow's qualifications was shown to have been inconsistent and therefore unreliable.

Accordingly, I find that Respondent discriminatorily selected Barlow for layoff in December 1981. Moreover, I find that Barlow was discriminatorily denied recall when he was not recalled instead of Pullum in February of 1982 and when McCullum was discharged later in 1982. At neither point, nor at any time thereafter, was any consideration given to recalling Barlow. By March of 1982, Respondent had taken the position that Barlow was a union agent and it was seeking to overturn the election partially because of some of his actions and conduct. I find that Respondent's failure to recall Barlow was motivated by the same discriminatory reason which caused him to be selected for layoff in December -- his prounion activities.

Harper's situation is different. He was the least senior and experienced machinist. Moreover, there is no evidence that new machinists were hired or that other employees performed work in the machine shop after the layoff which Harper could have performed. If there was more work available, as there was when Pullum returned to work in February of 1982 and when McCullum was discharged, Barlow, a more senior and experienced machinist, would have been recalled before Harper. In these

circumstances, I find that Harper was not unlawfully selected for layoff and was not unlawfully denied recall.

The remaining nine union adherents were classified as wirer-solderers or assemblers under Dorothy Jones and Cora Robinson. The explanations of Jones and Robinson for not retaining group leaders Eva Henry and Weader Lynch were limited to statements that the other group leaders who were retained were more senior, experienced and competent. However, this does not provide an adequate answer because both were outstanding employees, as their evaluations and job positions clearly show. Their breadth of experience, and therefore their flexibility, is confirmed not only by their evaluations but also by their own detailed and uncontradicted testimony. No reasons were offered why they were not retained as rank-and-file employees. They clearly had more experience and were more highly regarded than retained employees, some of whom had been hired in the summer of 1981 and had been trained by Henry and Lynch. Not only were these former group leaders not retained over less qualified people, as they should have been at the time of the layoff, but they were not recalled when obviously less qualified people were recalled to jobs for which they were clearly qualified. Dorothy Jones' statements to Henry and Lynch demonstrate that Lynch was not recalled because of her union activities. Accordingly, I find that Respondent not only discriminatorily selected Lynch and Henry for layoff, but also discriminatorily refused to recall them, on and after December 14, 1981.

Of the remaining seven employees, three -- Wells, Sherron and Helen Woodard -- were assemblers under the supervision of Cora Robinson. Her explanation for the selection of these employees was basically that the specific jobs they were doing before the layoff no longer needed to be performed. This explanation, however, does not take into account the factors of flexibility and competence that were supposedly important in the selection process. Robinson did not discuss the comparative abilities of those assemblers who were retained and Respondent did not submit their evaluations for comparison purposes. All six

assemblers who were retained by Respondent had less seniority than Helen Woodard and Sherron, some considerably less. Moreover, Woodard and Sherron had been recommended for and received pay increases after their December 1981 evaluations. They were rated "excellent" and "good" in the two assembly portions of the evaluations and were rated as having "good" attendance records. In contrast, Respondent retained employees under Robinson's supervision who were apparently less highly regarded. According to Cora Robinson, one of the factors she considered in retaining employees was attendance. Yet Respondent retained assembler Yvonne Woodard and employee Albert McFadden, both of whom worked under Cora Robinson. According to their most recent evaluations, introduced into evidence by the Union and the General Counsel, both had attendance problems. On September 3, 1981, Yvonne Woodard was denied a full increase in salary because of attendance problems. Her attendance was rated "unsatisfactory" in both February and September of 1981. McFadden's December 1981 evaluation also mentioned that his attendance needed improvement. Indeed, Cora Robinson testified that in mid-October 1981 she placed McFadden on 60 days' probation for "excessive tardiness." Thus, McFadden would still have been on probation at the time of the layoff. Since there is nothing in the record to indicate that Yvonne Woodard engaged in any union activity and McFadden's activity was confined to attending the first union meeting, their retention over that of more dependable prounion employees is unusual and contrary to Respondent's expressed standards for the retention of employees.

After analyzing the above evidence, I find that Sherron and Woodard would not have been selected for layoff but for their union activities. Wells' situation is somewhat different. She was the most junior assembler and, although her December 1981 evaluation was mostly "good," I cannot conclude that she was more competent than the more senior and experienced employees retained. I therefore do not find that she was unlawfully selected for layoff.

I turn now to employees Armstrong, Seay and Payne, wirer-solderers under the supervision of Dorothy Jones. She too seemed to focus on the specific job duties of particular employees selected for layoff without regard to the acknowledged factors of flexibility and competence. Thus, Jones testified that she laid off Lula Armstrong because she was a "new" employee who was short on productivity and flexibility. However, in her December 4, 1981 evaluation of Armstrong -- just one week before the layoff -- Jones had rated her "excellent" as a solderer and "excellent" in production. Armstrong was also rated in the assembly and harness fabrication categories, thus confirming her flexibility. Jones also noted that Armstrong "is a steady worker and has the abilities to learn fast." Although Armstrong was a "new" employee, having started work on July 20, 1981, two other wirer-solderers -- Guider and Barbara Williams -- who had been hired on July 7, 1981, just 2 weeks before Armstrong -- were retained. There is no evidence of their flexibility, competence or productivity and their evaluations were not placed into evidence. Indeed, Jones apparently retained an employee named Debra Hasty who had been hired in October of 1981 and who thus was "newer" than Armstrong. Hasty was fired in February of 1982. With the exception of Barbara Williams' attendance at the first union meeting, there is no evidence that these three retained employees participated in any union activities. In these circumstances, I find that Respondent has not shown that Armstrong would have been selected for layoff notwithstanding her union activities and thus has failed to rebut the General Counsel's showing of antiunion discrimination.[22]

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[22]In its brief, Respondent also asserts that Armstrong was laid off because of a "lack of experience and knowledge in key skills required for completing J-boxes." Respondent arrives at this position by juxtaposing Armstrong's testimony, in which she admitted that she had "no experience building harnesses for the J-box" and "had never wired or soldered PC boards," with that of Dorothy Jones and Cora Robinson, who asserted that these were the only tasks which needed completion as of December 13. However, both of these skills involved completion of subassemblies. And, as I have previously noted, one of the basic positions

According to Jones, she selected Annette Payne for layoff because she was a new employee whose work dealt with the large J-box but not the small J-box. There was really no adequate explanation as to why experience with one J-box and not the other was a disqualifying factor for the retention of employees. Indeed, most of Jones' testimony about the specific jobs of particular employees selected for layoff is of questionable import because flexibility was considered a significant factor in the retention of employees and there is no evidence concerning the flexibility of the employees retained. Moreover, Respondent's evaluations made no distinction between work on the large J-box or the small J-box, and, because they were prepared before the layoffs, they are a more reliable indicator of the breadth of experience deemed significant by Respondent than after-the-fact testimony by Jones. Payne's evaluation shows she was rated "excellent" as a solderer and in production. On her December 4, 1981 evaluation, Jones noted she was "adaptable and a very good worker." Although, here again, Payne was hired on July 13, 1981, Guider and Williams were hired just one week before and their evaluations were not placed into evidence by Respondent. Nor did Jones or any other official of Respondent testify about their competence, experience or flexibility. Payne was much more senior than Hasty, the retained employee who was fired a few months later, and she was regarded highly enough to be recalled in February of 1982. In these circumstances, Respondent has failed to show that Payne would have been laid off notwithstanding her union activities.

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of Respondent throughout these proceedings has been that no new subassemblies were to be completed after December 13. Moreover, in her testimony, Jones did not refer to this lack of skill as a basis for Armstrong's layoff. She instead testified only about Armstrong's purported lack of flexibility and productivity. In view of this obvious inconsistency in Respondent's positions as well as Jones' lack of reliance in her testimony on Armstrong's inability to perform the aforementioned tasks, I reject these factors as a legitimate justification for the layoff of Armstrong.

Jones also testified that Alyce Seay was laid off because she was a new employee and there was no need to perform the particular job that she was doing before the layoff. Seay was indeed hired on September 30, 1981. Her evaluation shows that she was rated "good" in soldering and production. Although Respondent has not shown that the retained wirer-solderers were more competent than Seay, they were all more senior. The least senior employee retained had 2 months' more experience than Seay. Nor was her evaluation outstanding. Moreover, Payne and Armstrong would have been retained before her. Thus, I believe it is unlikely that Seay would have displaced either of these employees or any of the other more experienced employees even assuming a non-discriminatory selective process had been used. Accordingly, I find that Seay was not discriminatorily selected for layoff.

James Lewis testified that his main job was "mechanical assembly," which he performed 75 percent of the time. He also operated a device called the "wave solder machine." He also testified that he trained an employee named Melvin Olive to "do the mechanical assembly on the junction box." Olive did not operate the wave solder machine. However, Olive was retained and Lewis was laid off. Lewis had been employed by Respondent since August 19, 1980. Olive had been employed since the same date. No reason was given for the retention of Olive, who was classified as an assembler, and no comparison was made between Lewis and Olive or the other less senior employees who were retained over Lewis. And Hasty, a less senior employee who was later discharged, was retained over Lewis.

Lewis appears to have had broad experience. He was rated in a number of different categories by Dorothy Jones in her December 4, 1981 evaluation of him. He was rated "good" in most of these categories, including production, but was rated "fair" in one soldering category. However, Jones said that Lewis was "adaptable" and had the ability "to learn new job[s]." Neither Jones, his last immediate supervisor before the layoff, nor any other official of Respondent gave a reason for the selection of

Lewis for layoff. However, in its brief, Respondent refers to Jones' testimony that Lewis "had the habit" of leaving his work place and that she warned him once about this. I am unable to accept this testimony as showing why he was selected for layoff. Jones never specifically testified that this was the reason why Lewis was selected for layoff. And Lewis' December 4 evaluation contains no adverse comments about his leaving his work station. Lewis credibly and candidly testified that he was in a group of employees who were verbally warned about leaving their work stations on one occasion. There is, however, no evidence to show that this was thought to be a significant matter by Respondent or that it adversely reflected on Lewis' work record. Indeed, Lewis was recommended for a raise, which he later received, shortly before he was laid off. Since there was no showing why Lewis, a more experienced employee was laid off and another employee whom Lewis had trained was kept, or why less senior or experienced employees were retained over him, Respondent has failed to rebut the General Counsel's *prima facie* showing that Lewis was discriminatorily selected for layoff.

According to Cora Robinson, "a couple of days" after the layoff a shipment of U-22 connectors arrived at the plant and "some soldering" and "some assembly" work was required to be performed because of that shipment. She testified that sub-assemblies were built at this time and that these were then transferred to Dorothy Jones' group of employees for completion. Robinson was unable to testify as to how many employees were needed for these functions, but the record shows that, on December 15, Respondent recalled assemblers Karen Adams, who had worked for Respondent only since July 18, 1981, and Jerome Pogue, who was hired on August 5, 1981, and, in the next few days, recalled assembler Georgia Robinson, whose seniority dated from January 2, 1981, and wirer-solderers Mae Rose Kelly, Beverly White and Yolanda Morgan. Kelly and White had been hired in October of 1981 and Morgan had been hired on September 28, 1981. Respondent also recalled employee Ronald Carson, who had been employed since August 3, 1981, in a job category called "material/kit control." His last evaluation, dated December 7,

1981, shows that his job involved "component prep." No one testified as to why he was recalled or what he did after he was recalled. Dorothy Jones' testimony is somewhat different than that of Robinson. She testified that she had need for employees White, Kelly and Morgan because certain switches were discovered in a storeroom and that these switches had to be wired and soldered to the small J-boxes.[23]

Even assuming that Respondent had a good business reason to select prounion employees Armstrong, Lewis, Payne, Woodard, and Sherron for layoff, its failure to recall them was unlawful.[24] They all had considerable seniority over many of the employees actually recalled and a comparison of their latest evaluations with those of the employees recalled shows that they had greater

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[23]Respondent took the position that Karen Adams and Jerome Pogue were recalled within days after the layoff because they had some experience in packaging work and that they were needed to perform such work. However, this was not their main function before the layoff and there is no evidence that they continued doing only packaging work after they were recalled. Indeed, Pogue returned to production work. Moreover, if experience, competence and flexibility were criteria in the layoff of December 13, they would likely have been factors in the recall of employees 2 or 3 days later. Yet neither Adams, who could not perform soldering, nor Pogue, who had been hired just 4 months before, would have been recalled under those criteria.

[24]The substance of Dorothy Jones' and Robinson's testimony was that the recalled employees were the only ones skilled in particular positions which became available in December and February. However, at no time in their testimony concerning the recall of employees did Robinson and Jones refer to the benchmarks of competence, experience, productivity, flexibility and attendance, which Respondent's witnesses had originally asserted were the factors to be utilized in determining which employees were to be retained. Documentary evidence in the form of typed memoranda from Dorothy Jones to Respondent's personnel office, which were apparently written after the recalls, indicate that these factors were indeed utilized, at least in the cases of Lula Armstrong and Annette Payne. Thus, as in the case of the layoffs, I find the performance review evaluations, which were prepared before the fact, to be a more accurate reflection of the skills and competence of the employees in question.

experience and were more highly regarded than those recalled. Recalled assemblers Adams, Pogue and Robinson had less seniority than assemblers Woodard and Sherron, and Pogue had had attendance problems, which were mentioned in his December 7, 1981 evaluation. Moreover, Sherron had been given an "excellent" rating for her assembly work whereas Robinson and Pogue were only rated "good" in this category. Nor was there any evidence that Robinson or Pogue was involved in any union activity. Finally, none of the ten assemblers ultimately recalled had more seniority with the Respondent than Woodard and Sherron, and some had been employed with the Respondent only a matter of months prior to the layoff. As for the wirer-solderers, Kelly, White and Morgan had less seniority than Armstrong, Lewis and Payne and their evaluations showed that the latter were more highly regarded. Armstrong and Payne, for example, received "excellent" ratings for both "production" and "soldering," whereas Kelly received only a "good" for production and Morgan and White were rated "good" in both production and soldering. Lewis, who had received "good" marks in these categories, had a broader experience in different kinds of soldering than did the three employees recalled. It also reflects adversely on Dorothy Jones' credibility that she emphasized the lack of seniority of employees when making selections for layoff but when it came to recalling employees just a few days after the layoff she demonstrably overlooked seniority.

Accordingly, in the first round of recalls, Armstrong, Lewis, Payne, Woodard and Sherron were not recalled and less competent and experienced employees were recalled. In view of the evidence that these individuals were known union adherents, I find that they were not recalled for the same discriminatory reasons that resulted in their selection for layoff.

In February 1982, six assemblers and seven wirer-solderers were recalled. Henry and Payne who had been discriminated against to this point were among those recalled. Thus, there were 11 additional positions to be filled. But the other discriminatees were not recalled to these positions. An analysis of the

evaluations and the seniority of the employees involved confirms that the discriminatees had greater experience and competence than those recalled. Surely, at this point, at least Lynch, a group leader who had made clear her willingness to return as a rank-and-file employee, should have been recalled. Dorothy Jones, herself, had recommended that she be one of the employees recalled. Yet Lynch was not recalled and the credited testimony conclusively shows that Respondent refused to recall Lynch because of her union activities. It is likely that this expression of Respondent's union animus explained the failure to recall other union adherents at this time.

As to Alyce Seay, a wirer-solderer who had been employed since September 30, 1981, and Bernice Wells, an assembler employed since September 21, 1981, I cannot find that, by virtue of seniority, experience or competence, they were more highly regarded or qualified than the employees recalled in December 1981. However, with regard to the February 1982 recalls, I reach a different conclusion.

In February, Respondent recalled six assemblers. An analysis of the evaluations and the seniority of all employees involved reveals that Bernice Wells had greater experience and competence than three of those recalled. In her December 1981 evaluation, Wells was rated "good." Although the only production category in which she was rated was "assembly, mechanical," her supervisor, Cora Robinson, specifically noted that she was "very flexible" and recommended her for an increase, which she received on December 7. Among those assemblers recalled in February was Nettie Wilson. Wilson received an evaluation similar to that of Wells -- she was rated good and the only production category in which she was rated was "assembly, mechanical." However, the evaluation contained no special annotation concerning her flexibility, and Wilson did not begin working with the Respondent until October 12, 1981, almost 3 weeks after Wells. Assemblers Callie Hollins and Clara Nash also were recalled in February 1982. Both started working with Respondent after Wells: Hollins began on October 21, 1981;

Nash on September 28. Both received good evaluations in December, but, unlike Wells, neither was rated in the "assembly, mechanical" category. Thus, Wells was employed by Respondent longer than any of the three recalled employees and was apparently more experienced than Hollins and Nash. It is true that the three recalled employees were, unlike Wells, supervised by Dorothy Jones. However, there was no reason given why assemblers from one line could not be recalled to work on the other line. In any event, Robinson also had an assembly position available on her line in February 1982. Respondent chose to recall Ossie Perkins, who was not only less senior than Wells, but was actually a wire solderer, and who, on her December 1981 evaluation, was not even rated in any of the assembly categories. Lastly, although it is clear, as previously noted, that Wells was active in the Union, there was no evidence introduced which suggested that the three recalled employees took any part in the union campaign. Accordingly, I find that Wells would have been recalled in February 1982, but for her union activity.

I next turn to Alyce Seay. As I previously noted, Respondent also recalled seven wirer-solderers in February. Because two of these recalls involved Henry and Payne and because wirer-solderer Perkins actually assumed assembler duties, only four wirer-solderers positions were available. Earline Leavy, Ozell Buchanan, Elaine Lindsay, and Alice Thompson were recalled to fill these vacancies. Based on the evaluations of all of these employees, which are in evidence, I am convinced that Leavy, Buchanan and Lindsay were properly recalled instead of Seay. Each had been employed by the Respondent only slightly longer than Seay, but their evaluations clearly indicated that they were more competent, highly regarded and flexible. Thompson, however, presents a somewhat different situation. She began working with Respondent on October 5, 1981, approximately one week after Seay. Like Seay, she was supervised and evaluated by Dorothy Jones. Seay received a "good" performance review in December. She was rated in both the "harness fabrication" and "soldering wire connection" categories. Thompson also received a "good" performance review in December. However, Thompson

was rated only in the "soldering, wire connection" category. Moreover, Jones testified that she chose Thompson for recall because she was an "almost excellent" wire solderer. Yet Seay received the same rating as Thompson in their last evaluations. Since Seay had been employed longer and, according to the evaluations, seemed more flexible, Respondent's selection of Thompson over Seay is contrary to its own standards. Moreover, Seay was an active participant in union affairs. On the other hand, the record is devoid of any evidence indicating any such participation by Thompson. Accordingly, I find that Seay would have been recalled in February 1982, but for her union activity.

In summary, I find that, by discriminatorily selecting employees Weader Lynch, Eva Henry, Ernest Barlow, Lula Armstrong, Annette Payne, Helen Woodard, James Lewis and Marion Sherron for layoff, and by discriminatorily refusing to recall them from layoff because of their union activities, Respondent violated Section 8(a)(3) and (1) of the Act. Respondent also violated Section 8(a)(3) and (1) by discriminatorily failing to recall employees Bernice Wells and Alyce Seay in February 1982.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with layoffs, loss of benefits and other forms of reprisals if they selected the Union in the upcoming election; by interrogating its employees about their union activities and those of other employees; by attempting to enlist the aid of an employee in polling other employees as to their union activities; by informing an employee that certain employees would not be recalled to work because of their union activities; and by creating the impression that its employees' union

activities were under surveillance, Respondent has violated Section 8(a)(1) of the Act.

4. By laying off some 50 production employees on December 13, 1981, because of the Union's victory in the December 11, 1981 representation election and to discourage union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By discriminatorily selecting for layoff and refusing to timely select for recall employees Lula Armstrong, Ernest Barlow, Marion Sherron, Eva Henry, Weader Lynch, Annette Payne, Helen Woodard, and James Lewis because of their union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By refusing to select for recall employees Alyce Seay and Bernice Wells because of their union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. The above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Except as found herein, Respondent has not committed any other unfair labor practices alleged in the Complaint.

The Remedy

I shall recommend that Respondent be ordered to cease and desist from engaging in the conduct found unlawful herein and to post an appropriate notice. I shall also recommend that Respondent be ordered to offer reinstatement to those employees who were unlawfully laid off or denied recall, as found herein. Respondent will also be ordered to make whole all those employees who have suffered any loss of pay or compensation due to the unlawful actions of Respondent, as found herein,

computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1965) and *Florida Steel Corp.*, 231 NLRB 651 (1977).[25]

ORDER[26]

Respondent, Sonicraft, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with layoffs, loss of benefits and other forms of reprisal for voting for the Union in a representation election.

(b) Interrogating employees about their union activities and those of other employees.

(c) Attempting to enlist or enlisting the aid of employees in polling other employees as to their union activities.

(d) Creating the impression that union activities are under surveillance.

(e) Informing employees that they would not be recalled to work because of their union activities.

(f) Laying off, refusing to recall, or otherwise discriminating against employees with regard to their hire, tenure of employ-

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[25]See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[26]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ment, or any term or condition thereof, because of their union activities or in order to limit or discourage union activities.

(g) In any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to those employees laid off as a result of Respondent's unlawful conduct as found herein, who have not already been recalled or rehired to their previous jobs, immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them and all other laid off employees whole for any loss of earnings, benefits or compensation connected with their employment status which they may have suffered as a result of Respondent's unlawful action in the manner set forth in the section entitled herein "The Remedy."[27]

(b) Remove and expunge from its records and files any notations dealing with the layoffs of the employees found to have been discriminated against herein and notify them in writing that this has been done and that evidence of such layoffs will not be used as a basis for future personnel actions.

(c) Post at its Chicago, Illinois facilities, copies of the notice attached hereto and marked "Appendix B."[28] Copies of this

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[27]The employees unlawfully laid off are listed in Appendix A to this Decision.

[28]In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES

notice shall be provided by the Regional Director for Region 13, and be duly signed by Respondent's authorized representative and posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and all other records necessary or appropriate to analyze the amounts due employees under this Order.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint not found to be sustained are hereby dismissed.

COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Supreme Court, U.S.
FILED
NOV 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-434

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

SONICRAFT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Intervening Respondent

BRIEF ON BEHALF OF INTERVENING RESPONDENT TEAMSTERS UNION LOCAL 743 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err as a matter of law in ruling that the National Labor Relations Board properly amended the complaint at trial to allege as violations of the National Labor Relations Act conduct of Petitioner, Sonicraft, Inc., that had been subject of an unfair labor practice charge which was dismissed more than six months prior to the amendment?

2. Did the Court of Appeals err as a matter of law in ruling that the Board's order, which found Petitioner unlawfully laid off and discriminatorily recalled employees in reprisal for their union sympathies and interrogated and threatened employees and created the impression their activities were under surveillance, was supported by substantial evidence?

PARTIES TO THE PROCEEDINGS

Sonicraft, Inc., Petitioner/Cross-Respondent-Petitioner.

National Labor Relations Board, Respondent/Cross-Petitioner-Respondent.

Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Intervening-Respondent/Cross-Intervening Petitioner-Intervening Respondent.

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STATEMENT OF THE CASE

This case involves a union organizing campaign begun in August 1981 and the mass layoff of 50 of 92 bargaining unit employees on December 13, 1981, two days after the Union's election victory. What the United States Court of Appeals for the Seventh Circuit described as "a straightforward case" (905 F.2d 146, 149 (June 12, 1990)) has since labored its way through administrative and judicial proceedings over the ensuing nine years. At issue is the proprietary of the National Labor Relations Board's ("Board") order permitting its General Counsel to amend an unfair labor practice complaint thirteen months later, alleging that Sonicraft, Inc. ("Petitioner" or "Sonicraft") violated the National Labor Relations Act (29 U.S.C. §§151 et seq.) ("Act) by laying off the employees.

STATEMENT OF FACTS

Sonicraft researches, develops and manufactures electronic and electro-mechanical systems, almost exclusively under contracts with the United States Department of Defense. Local 743, International Brotherhood of Teamsters ("Union") petitioned for and won a Board-conducted election on December 11, 1981 and was certified as the exclusive bargaining representative of Sonicraft's production, maintenance and warehouse employees on July 16, 1982.[1] On Sunday,

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[1]By its Supplemental Decision and Order dated September 24, 1985, the Board vacated the Union's certification of representative, set aside the December 1981 election, and dismissed an unfair labor practice complaint alleging that Sonicraft unlawfully failed and refused to recognize and bargain with the Union. 276 NLRB 407 (R.: Exh. I)

Citations to the decisions and documents in the proceedings below, appended to Petitioner's brief to the court of appeals, will be designated as "R.: _____."

December 13, 1981, Sonicraft notified 50 of its 92 employees that they were being laid off indefinitely. Sonicraft subsequently recalled 7 employees between December 15 and 19, and 16 employees were recalled in February 1982. (R.: Exh. C at 8)

The Union filed an unfair labor practice charge with the Board on February 22, 1982, alleging that Sonicraft violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by interrogating and threatening employees, promising them benefits, creating the impression that the employees' Union activities were under surveillance, and making statements indicating to employees the futility of Union representation. The charge also alleged that Sonicraft laid off and refused to recall the employees because they

selected the Union as their bargaining representative, in violation of Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)). (R.: Exh. H)

Following an investigation, the Board issued a complaint on April 29, 1982, alleging numerous separate violations of Section 8(a)(1) and a violation of Section 8(a)(3) by Sonicraft's refusal to recall 4 employees following the December layoffs. (R.: Exh. G) Also on April 29, the Board's Regional Director notified the parties that he was dismissing the Union's allegation that Sonicraft unlawfully laid off the employees, stating that the evidence was insufficient to show that the employees were laid off because they voted for the Union, they engaged in other Union and/or protected, concerted activities, or for any reasons other than

Sonicraft's economic justification. (R.: Exh. F) The Board's General Counsel subsequently denied the Union's appeal from the dismissal of that allegation and its request for reconsideration. (R.: Exh. C at 3)

The hearing on the April 1982 complaint lasted 24 days, from October 6, 1982 to May 24, 1983. The General Counsel successfully amended the complaint when the trial opened to allege two additional Section 8(a)(1) violations and, several days into the hearing, moved to amend the complaint further by alleging that the December 1981 layoffs of approximately 30 employees and Sonicraft's refusal to recall them were unlawful. The General Counsel based its motion on new evidence obtained through a recent interview of an employee and records received in

response to a subpoena, particularly a tape recording of a pre-election speech given by Sonicraft's President.

By letter dated December 1, 1982, the Regional Director revoked his earlier partial dismissal of the layoff-recall allegations, based on consideration of the new evidence presented. (R.: Exh. C at 3) The Administrative Law Judge denied the motion to amend on December 1; the Board reversed his ruling on December 8, directing the Judge to grant the motion to amend the complaint. The Board also denied, on February 7, 1983, Sonicraft's motion for reconsideration of its decision approving the complaint amendment. (R.: Exh. C at 4)

The regional office investigator was permitted to testify during the hearing concerning whether the evidence relied

on by the General Counsel in amending the complaint was previously offered and/or provided to the Board during its investigation of the charge. Sonicraft also was permitted to examine and copy any material in the investigatory case file indicating whether the Regional Director was or should have been aware of the evidence concerning the mass layoffs when he dismissed the allegations in April 1982. (Id.)

The Administrative Law Judge, in his February 14, 1984 decision, rejected the Company's arguments that the complaint amendment was improper because the General Counsel changed his position more than six months after the layoffs. The Judge found that the layoff issue in the complaint amendment was "reasonably related to the recall from layoff issue in the original Complaint, [and] evi-

dence of the former was effectively intertwined with evidence of the latter." (R.: Exh. C at 7) The Judge found that Sonicraft committed numerous violations of Section 8(a)(1) and violated Section 8(a)(3) of the Act by laying off 50 employees on December 13, 1981, by discriminatorily selecting for layoff and refusing to timely recall 8 employees, and by refusing to recall 2 employees. The Judge ordered Sonicraft to reinstate immediately and fully all of the employees and to make them whole for any loss of wages and benefits.

Eleven months after the Administrative Law Judge issued his decision, the Board issued its decision in Ducane Heating Corp., 273 NLRB 1389 (1985), enforced without opinion, 785 F.2d 304 (4th Cir. 1986), overruling California Pacific Signs, 233 NLRB 450

(1977), on which the Judge relied. In Ducane Heating, the Board held that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." 273 NLRB at 1390. The Board remanded this case to the Administrative Law Judge, by Order dated March 27, 1985, "for the limited purpose of addressing the Section 10(b) issues relating to the complaint amendment pertaining to the December 1981 employee layoffs in question in light of Ducane Heating Corp., supra." (R.: Exh. D at 2)

In his December 11, 1985 Supplemental Decision, the Judge reaffirmed his earlier findings and conclusions, but following the Ducane Heating remand, the Judge found specifically that Sonicraft made material misrepresentations during the investigation of the unfair labor practice charge concerning the audio tape of the President's pre-election speech to employees[2] and that those misrepresentations "influenced" the General Counsel's dismissal of the mass layoff

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[2]Sonicraft's counsel represented to the Regional Office investigator that the Company taped the President's speech and the question-and-answer session with employees but that the audio tape was undecipherable and, in any event, the President did not make any unlawful statements. A transcript of the taped speech and question-and-answer session showed otherwise. (R.: Exh. B at 6-10; Exh. C at 17-22)

allegations. The Judge found that in these circumstances Sonicraft's misrepresentations tolled the Section 10(b) statute of limitations, and the complaint amendment was proper. (R.: Exh. B at 13)

The Judge also found that the amended allegations were closely related "to the undismissed portion of the charge which spawned the Complaint." (R.: Exh. B at 19) The Judge found that the Board's Ducane Heating decision did not overrule the well-settled Board and court-approved "closely related" doctrine. The Judge noted specifically that Section 10(b) does not preclude amending a charge or a complaint involving incidents that are "similar to and arise out of the same course of conduct as those alleged in the timely-filed charge." (Id. at 19, quoting

Kelly-Goodwin Hardwood Company, 269 NLRB 33, 36 (1984), enfd. by memorandum opinion, Nos. 84-7243 and 84-7351 (9th Cir. 1985)). See also, Sonicraft, Incorporated, 905 F.2d at 148.

The Complaint amendment involved the layoff and refusal to recall the employees. The Judge noted that the amended allegations involved the same employer and the same bargaining unit; they arose out of the same organizing campaign; and they were closely related in time. The Judge further noted that "it was virtually impossible to determine which, if any, employees were discriminatorily recalled without considering all the recalls as well as the original reason they were laid off. Surely the reason for the layoffs provided a backdrop to explain the reason for the recalls and, since some recalls

took place within days of the layoff, the question lingers why a layoff occurred in the first place." (Id. at 20) Moreover, the layoff and refusal to recall allegations were based on the same alleged discriminatory conduct and provisions of the Act which supported finding unlawful the refusal to recall 4 employees, as alleged in the original Complaint. (Id.)

The Judge noted further that Sonicraft did not question the validity of the Complaint amendment on grounds of unfairness or prejudice. In fact, the Judge stated, Sonicraft suffered no prejudice. Board law at the time clearly permitted the amendment under Section 10(b); there was no lapse of time or loss of memory or records which hindered the Company's defense; and the Company had preserved the records neces-

sary to defend the recall allegations. The Judge therefor found that the General Counsel was not precluded from amending the Complaint to allege the discriminatory mass layoff, selection of employees for layoff, and refusal to recall specific employees, even though the conduct occurred 11½ months before the amendment. (Id. at 26)

The Board majority (Members Johansen and Devaney, with Chairman Stephens dissenting) adopted the Administrative Law Judge's Supplemental Decision by Order dated June 15, 1989. (R.: Exh. A) In the interim the Board had issued its decision in Redd-I Inc., 290 NLRB No. 140, 129 LRRM 1229 (1988), in which the Board limited Ducane Heating to "an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge."

Redd-I Inc., 129 LRRM at 1231. The Board agreed with the Judge's analysis and conclusions that the amendment allegations were closely related to the outstanding timely filed charge[3] and that, absent a showing of surprise, Sonicraft suffered no denial of due process. (R.: Exh. A at 2, fn. 2 (case citations omitted)) Having found that the amendment allegations were closely related to the content of the original charge, the Board found it unnecessary to reach the fraudulent concealment issue.

Sonicraft argued to the court of appeals that the Board's decision in Ducane Heating overruled the "closely related" doctrine, even if sub silentio,

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[3]Chairman Stephens agreed, in dissent, that the allegations in the timely filed charge and the Complaint amendment were closely related.

and precluded use of that theory to add to a complaint allegations that were previously dismissed. See 905 F.2d at 148-49. The Company also argued, inter alia, that the "closely related" doctrine should apply only to situations where the additional complaint allegations never were subject of an unfair labor practice charge, rather than allowing the General Counsel to resurrect previously dismissed or withdrawn unfair labor practice charge allegations.

The court of appeals rejected the Company's arguments, noting that Redd-I explicitly stated that the "closely related" doctrine survived Ducane Heating. 905 F.2d at 149. The court of appeals, in an opinion by Judge Posner, reviewed the Board's "common law" doctrine, paralleling Rule 15(c) of the

Federal Rules of Civil Procedure, "that an amendment which is 'closely related' to the original charge relates back to the date of the original complaint." 905 F.2d at 148 (case citations omitted). The court found that the allegations concerning the layoffs were indeed closely related to those of the discriminatory recall and, in fact, "were the one-two punch in the company's scheme of retaliation." Id.

Sonicraft did not argue before the court of appeals that the belated Complaint amendment impeded its defense or prejudiced it in any way; nor did the Company argue that it was lulled into thinking that it would no longer be faced with the prospect of litigating the legality of the layoffs that occurred 11½ months before. The court rejected Sonicraft's argument that, once

a charge is dismissed or withdrawn, it is dead. Death may in fact be final but the allegations in the "dead" charge may be resurrected if they are closely related to those in a live, timely-filed charge.

The court of appeals found Sonicraft's distinction between withdrawn and dismissed allegations to be unavailing. Redd-I involved a withdrawn charge; Ducane Heating, and Sonicraft, involved dismissed charges. Although the Board relied on Redd-I in affirming the Judge in this case, and did not explain the difference between Redd-I (withdrawn) and Ducane Heating (dismissed), the court found, cited and relied on a case not previously cited to it. In Stern Entertainment System, Inc., t/a Heaven, 290 NLRB No. 167, 130 LRRM 1147 (1988), issued just one week

after Redd-I, the Board held expressly that Redd-I and the "traditional 'closely related' test" would apply to withdrawn as well as dismissed charges. 130 LRRM at 1149. Thus, the court declared, the "last link in the chain of precedent from Ducane to the present case has been forged." 905 F.2d at 149.

The court summarily rejected The Company's attacks on the Administrative Law Judge's findings of fact, finding them supported by overwhelming evidence. Finally, the court also rejected the Company's contention that this Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. ____, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) repudiated the Board's rule, endorsed in NLRB v. Transportation Management Corp., 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed. 667 (1983), that in a mixed-motive case the

burden of negating causation is on the employer. The court of appeals noted that Transportation Management was cited approvingly in Price Waterhouse v. Hopkins, 490 U.S. ____, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989). That the Company would have laid off the employees anyway, even two days after the Union won its election, was an affirmative defense on which Sonicraft had the burden of persuasion. The court found Sonicraft failed to carry it. 905 F.2d at 150. In enforcing the Board's Order, the court of appeals passed over other issues raised by Sonicraft.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY REJECTED SONICRAFT'S ARGUMENT THAT PORTIONS OF THE AMENDED COMPLAINT WERE BARRED BY SECTION 10(b).

A. The Allegations Of The Complaint Amendment Were Closely Related To The Undismissed Allegations In The Original Unfair Labor Practice Charge And Properly Were Reinstated And Litigated.

Section 10(b) of the Act (29 U.S.C. §160(b)) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ." Section 10(b) also states that "[a]ny such complaint may be amended by the . . . Board in its discretion at any time prior to the issuance of an order based thereon." The six month limitation period of Section 10(b) "applies only to the filing and service of a charge and not to the issu-

ance or amending of a complaint." NLRB v. Complas Industries, Inc., 714 F.2d 729, 734 (7th Cir. 1983).

"A complaint, as distinguished from a charge, need not be filed . . . within the six months, and may therefor be amended after the six months." NLRB v. Dinion Coil Co., 201 F.2d 484, 491 (2d Cir. 1952). The Supreme Court stated in NLRB v. Fant Milling Co., 360 U.S. 301, 307, 79 S.Ct. 1179, 3 L.Ed.2d 1243, (1959), that "a charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." Further, "[o]nce [the Board's] jurisdiction is invoked [by the filing of an unfair labor practice charge] the Board must be left free to make full inquiry. . . . There is no

justification for confining such an inquiry to the precise particularities of a charge." NLRB v. Fant Milling Co., 360 U.S. at 308. Thus, a complaint that is based upon a timely-filed charge may be amended to include allegations not raised in the underlying charge if the additional allegations are "closely related" to the violations set forth in the charge and which occurred within six months of the date on which the charge was filed. NLRB v. Complas Industries, Inc., 714 F.2d at 733; NLRB v. Dinion Coil Co., 201 F.2d at 491.

Since the early history of the National Labor Relations Act, many cases interpreting it have given the Labor Board broad leeway in conducting its investigations and bringing complaints alleging unfair labor practices. The Supreme Court recognized in National

Licorice Company v. NLRB, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), that a complaint may include allegations of conduct that were not specified in the original unfair labor practice charge. In National Licorice, the petitioner contended that the unfair labor practice charge is a jurisdictional prerequisite to the complaint and subsequent proceedings are restricted to the specific unfair labor practices alleged in the charge. The Court rejected this argument, stating that:

> It is unnecessary for us to consider how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor prac-

> tices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.

309 U.S. at 369. The relationship between the existing charge and the complaint amendment allegations "need be close enough only to negate the possibility that the Board is proceeding on its own initiative rather than pursuant to a charge." NLRB v. Central Power & Light Co., 425 F.2d 1318, 1321 fn. 3 (5th Cir. 1970).[4]

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[4]The Supreme Court in Local No. 1424, International Machinists v. NLRB, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), stated that the policies underlying Section 10(b) "are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep. No. 245, 80th Cong., First Sess., page 40, and of course to stabilize existing bargaining relationships." 362 U.S. at 419.

Following this reasoning, the Seventh Circuit in NLRB v. Complas Industries, supra, upheld the Board's amendment of a complaint to include an allegation of unlawful interrogation because that unfair labor practice was related to the claim of an employee's illegal discharge. The amended allegation

> grew out of the original allegation 'while the proceeding [was] pending before the Board.' . . . [T]he specific claim in the charge and the claim in the amended complaint were closely related in time; most importantly, the alleged interrogation would never have occurred but for the original charge, Texas Industries, Inc. v. NLRB, 336 F.2d 128, 132 (5th Cir. 1954); furthermore, the evidence used as a basis for the amended complaint would have been gathered during a proper investigation of the charge. . . . Thus, we conclude that inclusion of the claim of an illegal interrogation was not beyond the scope of the Board's authority, and that a filing of a new charge was not required to support the additional claim in the amended complaint.

714 F.2d at 733. See also, NLRB v. Braswell Motor Freight Lines, Inc., 486 F.2d 743, 746 (7th Cir. 1973).

The Board employs its traditional, well-settled test for determining whether complaint allegations are closely related to those in an underlying charge "without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed." Redd-I Inc., 129 LRRM at 1233. See also, Sonicraft, Inc. v. NLRB, 905 F.2d at 148. Under the Board's "closely related" test, allegations that involve 'the same class of violations'" and are a "'continuation[] of the [violations] in pursuance of the same objects'" as those alleged in a timely-filed charge may be included in the complaint. NLRB v. Fant Milling Co., 306 U.S. at 307 (citation omitted).

See also, NLRB v. Braswell Motor Freight Lines, 486 F.2d at 746 (conduct complained of was "of the same class and character as . . . in the original charge," occurred "within the same general time period," and "was part of an overall plan to resist organization" and was properly included in complaint).

The Board recently reaffirmed its traditional "closely related" test in Redd-I Inc., supra.[5] The Board looks first at "whether the otherwise untimely allegations are of the same class as the

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[5]Contrary to the Petitioner's assertion, the Board's "closely related" doctrine is anything but "unrefined." (Ptr. Brf. at 17) See, e.g., Dinion Coil Co., supra; Sonicraft, Inc. v. NLRB, 905 F.2d at 148 (the Board's closely related doctrine parallels that of Rule 15(c), F.R.C.P., that an amendment closely related to original charge relates back to date of original complaint); and Redd-I Inc., 129 LRRM at 1231-32.

violations alleged in the pending timely charge," whether the allegations involve the same legal theory and provision of the Act. Second, the Board considers "whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge," whether the allegations involve similar conduct, "during the same time period with a similar object." Finally, the Board "may look at whether a respondent would raise the same or similar defenses to both allegations, and thus . . . would have preserved similar evidence and prepared a similar case" in defending against both allegations. Redd-I Inc., 129 LRRM at 1233.

Here the Union filed an unfair labor practice charge on February 22, 1982, alleging that Sonicraft unlawfully laid

off employees on December 13, 1981, and refused to recall them because they selected the Union as their bargaining representative. The charge also alleged that, beginning in August 1981, Sonicraft threatened and interrogated employees and created the impression that they were under surveillance. The Regional Director dismissed the mass layoff allegation and issued a complaint alleging that Sonicraft unlawfully refused to recall 4 employees and threatened, interrogated and conducted surveillance on employees both before and after the December 1981 layoffs. (R.: Exhs. F and G) Significantly, the Complaint alleged that one supervisor informed an employee that she was being laid off because of her Union activities and that this and another supervisor informed other employees that they were

not being recalled from layoff because of their Union activities. (R.: Exh. G at 3, ¶V(e), (f), (g)).

The Amended Complaint, filed on January 20, 1983, was based on evidence provided pursuant to a subpoena of Company documents. The amendment included the allegation that approximately 30 employees had been laid off and not recalled because of their Union activities. (R.: Exh. E, at 4, ¶VI).

These allegations involved the same employer, the same group of employees, occurred over the same time period (the mass layoff took place two days after the Board-conducted election), and arose out of the same factual situation and sequence of events --the Union election campaign. NLRB v. Fant Milling Co., supra; NLRB v. Braswell Motor Freight Lines, supra; Redd-I Inc., supra. As

the court of appeals stated, "The allegations in this case concerning the layoffs are closely related to the allegations of discriminatory recalls; the recalls began only 4 days after the layoffs, and the layoffs and the recalls were the one-two punch in the Company's scheme of retaliation." 905 F.2d at 148.

Therefore, the Board properly relied on its "closely related" doctrine to amend the Complaint thirteen months after the alleged unlawful layoffs, notwithstanding the fact that the layoff allegations previously had been dismissed for lack of sufficient evidence. The Board's Order finding Sonicraft violated the Act by laying off 50 employees and discriminatorily selecting employees for recall properly was enforced by the

Seventh Circuit Court of Appeals.[6]

Sonicraft's reliance on Local No. 1424 International Machinists v. NLRB, supra, is misplaced. There the Board litigated a Union-filed unfair labor practice charge alleging that the enforcement of a collective bargaining agreement was illegal, based on the fact that the Union did not enjoy majority

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[6]Petitioner's assertion at page 14 of its brief, that the alleged discriminatory recall of 4 employees "had nothing at all to do with the events which caused the layoff," is absolutely preposterous. The Administrative Law Judge, the Board and the court of appeals found otherwise. The decisions below found that the discriminatory recalls flowed directly from Sonicraft's anti-Union campaign and its hostile reaction to the employees selecting the Union as their exclusive bargaining representative. As the court of appeals stated, the evidence was overwhelming that the layoffs and selective recalls were motivated by Sonicraft's hostility to the Union and its supporters. 905 F.2d at 149.

status at the time of the contract's execution several years before the charge was filed. The Court held that the complaint was barred by the Section 10(b) statute of limitations, since "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid Union security clause was wholly benign." 362 U.S. at 417-418.

The Machinists Court addressed the question of whether Section 10(b) was a rule of evidence or a statute of limitations. First, Section 10(b) ordinarily does not bar the evidentiary use of conduct occurring outside the limitations period "to shed light on the true character of matters occurring within

the limitations period." 362 U.S. at 416. The second situation arises when conduct occurring within the six-month limitations period can be found to be an unfair labor practice only through reliance on time-barred evidence. In this situation, the use of earlier alleged unlawful conduct "is not merely 'evidentiary' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful." 362 U.S. at 417. To permit the substantive use of time-barred conduct in such a manner, the Court stated, in effect results in reviving a legally dead unfair labor practice. Id.

What the Supreme Court condemned in Machinists was allowing the Board "to convert what is otherwise legal into something illegal," by relying on time-

barred evidence of an unfair labor practice as the sole basis for finding a violation. To do so, "would vitiate the policies underlying Section 10(b)." 362 U.S. at 419. Here, the Amended Complaint was based on allegations that occurred within six months of the filing of the unfair labor practice charge on which the initial Complaint was based. The mass layoff and discriminatory recall allegations were closely related, "the one-two punch," Sonicraft, Inc. v. NLRB, 905 F.2d at 148, to those in the undismissed charge and the initial Complaint. Contrary to Sonicraft's assertions, the Board's "closely related" doctrine is not at variance with the Supreme Court's ruling in Machinists and does not create an impermissible exception to Section 10(b).

B. There Is No Conflict Between The Courts Of Appeals Warranting Review Of This Case By The United States Supreme Court.

As a ground supporting its petition for writ, Sonicraft argues that the decisions of the Board and the court of appeals conflicts with decisions of other circuits, NLRB v. Electric Furnace Co., 327 F.2d 373 (6th Cir. 1963) and NLRB v. Silver Bakery, Inc., 351 F.2d 37 (1st Cir. 1965), and implicitly conflicts with NLRB v. Wizard Method, Inc., 897 F.2d 1233 (2d Cir. 1990). Ptr. Brf. at 16. Even a cursory review of the cited cases will reveal no conflict between the Seventh Circuit Court of Appeals decision below and the other circuits.

In Silver Bakery, supra, the First Circuit Court of Appeals denied enforcement of a Board order, rejecting the

Board's theory that the General Counsel has unlimited discretion to proceed on unfair labor practice charges, which in that case had been withdrawn leaving no pending proceedings. The Board had relied on "equitable principles" favoring the prosecution of the alleged unfair labor practice. The court of appeals found the Board's theory "was created out of whole cloth" and that there was no reason why the mere filing of an unfair labor practice charge "should leave the Board roving discretion" to determine whether the equities warranted the reinstatement of proceedings without time limitations. 351 F.2d at 39.

The Board's discretionary theory of prosecuting unfair labor practices was clearly repudiated in Ducane Heating, 273 NLRB at 1391, which overruled

California Pacific Signs, 233 NLRB 450 (1977) and Winer Motors, 265 NLRB 1457 (1982). (Winer Motors limited the General Counsel's discretion to reinstate withdrawn charges outside the six-month limitations period to cases involving fraudulent concealment by the respondent.)

The Sixth Circuit Court of Appeals denied enforcement of the Board's decision in Electric Furnace, supra. The Board found that the company's initial refusal to furnish the Union with requested information was a continuing violation which, although the information was supplied in January 1961, carried over into the six-month period before complaint issued in May 1961. The court of appeals rejected the Board's theory that the company's refusal to provide the requested infor-

mation was a continuing violation. Citing the Supreme Court's decision in Machinists, supra, the court of appeals stated, "To hold that this Act continues indefinitely in the absence of further requests by the union and under the circumstances here does violence to Section 10(b) and renders this provision of the Act virtually impotent." 327 F.2d at 376. See also, Lorance v. AT&T Technologies, Inc., 490 U.S. ____, 109 S.Ct. 2261, ____ L.Ed.2d ____ (1989) (Court rejected use of continuing violation doctrine to avoid limitations period under Title VII to cure untimeliness). Sonicraft's layoff of more than half of its workforce was not alleged or litigated as a continuing violation.

Finally, no conflict, implicit or otherwise, can be found with the Second

Circuit Court of Appeals decision in Wizard Method, Inc., supra. In that case, the Board's Regional Director reinstated a Section 8(a)(3) allegation one year after the employee's discharge. In enforcing the Board's Order, the court of appeals noted that the company waived its Section 10(b) defense by not raising it at trial or before the Board. Thus, the issue properly was not before the court. Moreover, this is the same court which issued Dinion Coil, which set forth the "most frequently cited test for finding allegations closely related." Redd-I Inc., 129 NLRB at 1231.

Accordingly, the court of appeals' decision below presents no conflict with decisions of other circuits, or with decisions of this Court, warranting review by the Court.

Finally, Sonicraft's arguments concerning the burden of proof in cases

alleging an employer's discriminatory motive, specifically that the Board with the court of appeals' approval has misplaced the burden of establishing the invalidity of respondent's defense, are singularly unavailing. The court of appeals properly and correctly determined that this Court's decision in Wards Cove Packing Co. v. Atonio, supra, did not abrogate the Board's longstanding burden of proof rule, endorsed in NLRB v. Transportation Management Corp., supra. See also, Price Waterhouse v. Hopkins, supra. The court of appeals determined that in Wards Cove the Supreme Court referred to and retained "a fine-spun distinction in Transportation Management found also in Price Waterhouse, rather than repudiating either decision." 905 F.2d at 150. Under Transportation Management, the

burden of proving the employer's union animus never shifts from the General Counsel; if the General Counsel carries that burden, the employer can defend the allegations by showing that the discharge or layoff would have taken place in any event, for nondiscriminatory reasons.

Sonicraft bore the burden of persuasion as to its affirmative defense that the layoffs two days after the Union election were the result of nondiscriminatory, economic considerations. As the court of appeals found, Sonicraft failed to carry it. 905 F.2d at 150.

CONCLUSION

Teamsters Union Local 743 respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 90-434

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SONICRAFT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board acted within its discretion in amending an unfair labor practice complaint to include an allegation of discriminatory mass layoff that was closely related to a pending, timely filed unfair labor practice charge alleging discriminatory recall from that mass layoff.

2. Whether the Board, having determined that union activity was a motivating factor in petitioner's decision to lay off over half of the unit employees, properly applied the burden of proof allocation approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 905 F.2d 146. The supplemental decision and order of the National Labor Relations Board (Pet. App. 10a-15a), the supplemental decision of the administrative law judge (Pet. App. 16a-41a), and the initial decision of the administrative law judge (Pet. App. 45a-113a), are reported at 295 N.L.R.B. No. 78.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on June 12, 1990. The petition for a writ of certiorari was filed on September 10,

1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1981, Warehouse, Mail Order, Office, Technical and Professional Employees Union Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) began an organizing campaign among petitioner's production, maintenance, and warehouse employees. Pet. App. 54a. Petitioner's management, beginning in September 1981, responded to the organizational campaign by coercively interrogating the employees, creating the impression that their activities were under surveillance, and threatening that unionization could result in job loss. *Id.* at 57a-58a, 60a, 62a-63a, 65a-66a, 71a-78a.

On November 25, for instance, petitioner's president, Jerry Jones, gave a speech to employees expressing opposition to the Union. Pet. App. 71a. During the speech and the following question and answer session, Jones threatened employees with loss of benefits—including petitioner's practice of keeping employees at work during slow periods—if they selected the Union as their collective bargaining representative. *Id.* at 73a-74a, 77a. In early December, one of petitioner's supervisors told two employees that "if the Union did get in," Jones would "either move the company, hire new employees or lay off the employees he had" and that the employees "would be the ones to not have a pleasant Christmas and be in the unemployment line." *Id.* at 60a.

In the ensuing Board-conducted representation election, which was held on Friday, December 11, the Union won by a vote of 45 to 35. On Sunday, December 13, petitioner's supervisors notified 50 of the

92 unit employees that they had been laid off and, the next day, informed them that the layoffs were indefinite. Only one nonunit employee was laid off, and no supervisors were affected. Pet. App. 56a.

Several laid off employees were told by their supervisors that the layoffs were attributable to the Union's victory. Employee Weader Lynch was told by her supervisor that President Jones was very upset "because the union had won" and had decided that "these people [on a list of attendees at the Union victory celebration] would definitely not be coming back to work." Pet. App. 64a. Employee Mary Durham was told by a production supervisor that the employees were laid off because work was slow, "plus the Union came in." *Id.* at 66a. When employee Eva Henry was recalled to work in February 1982, she asked Supervisor Dorothy Jones whether Lynch, who was also under Jones' supervision, would be returning to work. Jones replied that Lynch "wasn't coming back" because she was on a "no-no list." When Lynch called Jones to verify the information, Jones advised that "there were two lists, one of people who would come back and one of people who would not come back." Supervisor Jones explained that President Jones' lawyer had advised petitioner not to recall Lynch "because she was a troublemaker and affiliated with the Union." Pet. App. 79a.

Within days after the layoff, petitioner began recalling employees. Seven employees were recalled in December 1981, and thirteen were recalled in February 1982. Between February 1982 and February 1983, petitioner hired ten new employees classified as "storeroom clerk" or "janitor." In February 1983, petitioner rehired three members of the Union organizing committee (Lula Armstrong, Weader Lynch,

and Alyce Seay) after requiring them to pass a test that was more difficult than the test they had taken when first hired. None of the existing employees was required to pass the test. Petitioner did not recall any other laid off employees. In March 1983, it began hiring a number of new employees for unit positions. Pet. App. 3a, 56a-57a, 81a n.12, 106a-109a.

2. a. On February 22, 1982, the Union filed a charge with the National Labor Relations Board alleging that petitioner had violated the Act by laying off employees on December 13, 1981, and refusing to recall them for discriminatory reasons; the Union also alleged that, beginning in August 1981, petitioner threatened and interrogated employees and created the impression that they were under surveillance. Pet. App. 48a; C.A. App. Exh. H. On April 29, 1982, the Regional Director dismissed the portion of the charge concerning the original layoff and issued a complaint alleging that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to recall four employees who had been laid off on December 13, and had violated Section 8(a)(1) by threatening and interrogating employees, and giving them the impression that Union activities were under surveillance, both before and after the layoffs. Pet. App. 48a. See also Pet. App. 32a; C.A. App. Exh. G.[1]

b. On December 1, 1982, after the opening of the unfair labor practice hearing before an Administrative Law Judge and in response to subpoenaed evi-

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[1] The Union unsuccessfully appealed the Regional Director's partial dismissal of the charge to the General Counsel and sought reconsideration of the General Counsel's denial of its appeal. Pet. App. 48a.

dence, the General Counsel moved to amend the complaint to include the previously dismissed allegation that the layoffs were unlawful. The ALJ denied the motion, but, on December 8, the Board reversed and directed the ALJ to grant the motion to amend. In February 1983, the Board denied petitioner's motion for en banc reconsideration, but noted that the denial was without prejudice to petitioner's right to renew its contentions through the filing of an appropriate exception. Pet. App. 48a-49a.

c. The proceedings resumed, and the case was tried for 24 days between October 1982 and May 1983. Pet. App. 45a. On February 14, 1984, the ALJ issued his opinion, addressing both petitioner's renewed challenge to the amendment and the merits.[2] He reaffirmed the propriety of the amendment and rejected petitioner's contention that Section 10(b) of the Act, 29 U.S.C. 160(b), precluded the amendment. Pet. App. 51a.[3] The ALJ noted that, in *California Pacific Signs, Inc.*, 233 N.L.R.B. 450 (1977), the Board had recognized "the General Counsel's virtually unlimited discretion to proceed on [dismissed] charges after he has initially refused to issue Complaint on them." Pet. App. 52a.[4] The ALJ added

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[2] In January 1983, the case had been assigned to a different ALJ. Pet. App. 45a.

[3] Section 10(b) provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *." 29 U.S.C. 160(b).

[4] The ALJ rejected petitioner's reliance on *Winer Motors Inc.*, 265 N.L.R.B. 1457 (1982), noting that there, in precluding the reinstatement after the six-months limitation period of a *withdrawn* charge, one concurring Board Member had specifically distinguished the case of reinstatement of a *dismissed* charge. Pet. App. 52a.

that, in the circumstances of this case, the amendment resulted in no "unfairness or lack of due process." Pet. App. 53a. Thus, "[w]hen the Complaint was amended, full opportunity was given to [petitioner] to prepare its defense and to answer the new Complaint allegations." Pet. App. 54a. Moreover, the layoff issue was "reasonably related to the recall from layoff issue in the original Complaint," and "evidence of the former was effectively intertwined with evidence of the latter." *Ibid.*

On the merits, the ALJ concluded that petitioner violated Section 8(a)(1) of the Act by coercively interrogating and threatening its employees, and by creating the impression that their union activities were under surveillance. Pet. App. 57a-80a, 109a-110a. The ALJ also found that petitioner laid off the 50 employees in reprisal for the Union's election, in violation of Section 8(a)(3) and (1) of the Act. Pet. App. 80a-94a, 110a.[5] The ALJ concluded that petitioner's discriminatory motive for the layoffs was established by (1) the fact that they were decided upon immediately after the Union won the election; (2) the violations of Section 8(a)(1) committed by petitioner's managers before the layoffs (notably President Jones' unlawful threats of loss of benefits and Supervisor Denson's threat of a layoff if the Union won); and (3) the admissions of petitioner's supervisors that it laid off employees because of the Union victory. Pet. App. 80a-81a. The ALJ rejected petitioner's contention that the layoffs were brought about because of a cash flow problem that coincided with a

[5] The ALJ further found that the Company discriminatorily selected for layoff eight named employees and refused timely to select for recall ten named employees. Pet. App. 109a.

parts shortage and over-accumulation of nearly completed products. He found that the "evidence does not show a severe problem either in inventory or in cash flow that would justify such a precipitous and far reaching layoff." Pet. App. 93a. Accordingly, he determined that petitioner "failed to prove, in response to the General Counsel's showing of discriminatory motivation, that it would have laid off indefinitely over 50 percent of its production employees in the absence of the Union's election victory on December 11." *Ibid.*

d. On March 27, 1985, the Board remanded the case to the ALJ to reconsider the amendment issue in light of *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), which had been decided after the ALJ's decision. Pet. App. 42a-44a. The Board noted that the ALJ had relied on *California Pacific Signs*, and that *Ducane* had overruled *California Pacific Signs*. Pet. App. 42a. In *Ducane*, the Board held that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent [fraudulent concealment]." 273 N.L.R.B. at 1390.[6]

e. On December 11, 1985, the ALJ concluded that *Ducane* did not preclude the amendment because the mass layoff alleged in the amendment was closely related to the timely filed charges that supported the original complaint. Pet. App. 28a-37a.[7] The ALJ explained that *Ducane* did not overrule longstanding

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[6] In *Ducane*, the Board also reversed *Winer Motors*. 273 N.L.R.B. at 1390. The Board's decision in *Ducane* was eventually enforced by the Fourth Circuit. 785 F.2d 304 (1986) (table).

[7] The ALJ pointed out that "[t]he amendment involved the layoff and refusal to recall all employees, the same discriminatory basis and section of the Act that undergirded

Board and court precedents holding that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended complaint " 'which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge.' " Pet. App. 29a (quoting *Kelly-Goodwin Hardwood Co.*, 269 N.L.R.B. 33, 36-37 (1984), enforced mem., 762 F.2d 1018 (9th Cir. 1985) (Table)); Pet. App. 33a. The ALJ explained (*id.* at 34a) (citation omitted):

> There is no difference—in terms of the Section 10(b) rationale of *Ducane*—between allegations in a dismissed charge which "ceases to exist"—and allegations which were never made part of a charge. If the latter time-barred allegations can properly be amended into a case pursuant to the "closely related" doctrine—as the cases clearly hold—then the former should also be susceptible to amendment if they likewise are "closely related." The policy behind Section 10(b)—that stale allegations should not be litigated after records are lost and memories dim—applies equally to both types of cases.

As a separate ground for his conclusion, the ALJ also determined that the amendment should be permitted because petitioner had made material misrepresentations that tolled the statute of limitations. Pet. App. 18a-28a.

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the four refusals to recall that were the basis for the original Complaint. Both allegations involved the same employer and the same unit and arose out of the same campaign, which ended in a union victory in the election of 11 December. They are also closely related in time." Pet. App. 31a (footnote omitted). The ALJ also noted that the layoff allegation was related to the Section 8(a)(1) threat charges. *Id.* at 32a.

f. On June 15, 1989, the Board affirmed. Pet. App. 10a-15a. With regard to the amendment of the complaint, the Board agreed with the ALJ that the charges in the amended complaint were closely related to the timely filed charge and that the amendment should be permitted; it cited its decision in *Redd-I, Inc.*, 290 N.L.R.B. No. 140 (Sept. 16, 1988). Pet. App. 12a n.3.[8] The Board added that "[i]n the absence of a showing of surprise that would have hampered presentation of [petitioner's] defense at hearing after the complaint was amended, we find that [petitioner] has suffered no denial of due process." Pet. App. 12a-13a n.3. The Board thus found it unnecessary to address the ALJ's conclusion that petitioner had fraudulently concealed relevant evidence. *Ibid.*[9]

With regard to the merits, the Board adopted the rulings, findings, conclusions and recommended Order of the ALJ. Pet. App. 11a-13a.[10]

3. The court of appeals enforced the Board's order. Pet. App. 1a-7a. The court rejected petitioner's contention that the amendment alleging unlawfulness of the mass layoff was barred by Section 10(b) of the

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[8] In *Redd-I, Inc.*, the Board held that, where the General Counsel seeks to amend a complaint relying on a timely filed charge, the Board will "apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed." Slip op. 4.

[9] Chairman Stephens dissented from the Board's holding that the amendment was proper. Pet. App. 13a-15a.

[10] The Board modified the remedy to change the computation of interest. Pet. App. 12a-13a & n.4.

Act. The court noted that Section 10(b) authorizes the Board to amend a complaint at any time. Pet. App. 2a. It further noted that the Board's rule conforms to "the usual rule, codified * * * in Rule 15(c) of the Federal Rules of Civil Procedure * * * that, for purposes of determining whether the statute of limitations has run, an amendment to a complaint relates back to the original complaint if it arises out of the dispute that gave rise to the original complaint." Pet. App. 2a-3a. The court agreed with the Board that the allegation of discriminatory layoffs in the amendment was closely related to the allegations of discriminatory recall in the original complaint. The court pointed out that "the recalls began only four days after the layoffs, and the layoffs and the recalls were the one-two punch in the company's scheme of retaliation." Pet. App. 3a.

The court rejected petitioner's contention that the Board's decision here was contrary to its recent decision in *Ducane*. Quoting the Board's decision in *Redd-I*, the court noted that *Ducane* is limited to " 'an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge.' " Pet. App. 4a. The court disagreed with petitioner that it was unreasonable to distinguish between dismissed charges unrelated to matters charged in the complaint and related charges. The court observed (Pet. App. 5a):

> The only possible significance of the dismissal of a closely related charge is that it might lull a respondent into thinking he didn't have to worry any longer about defending himself against that charge. But this possibility depends on the rule; after *Redd-I* it is plain that he does still have to

worry, provided the dismissed allegations are closely related to the remaining ones. [11]

Addressing the lawfulness of the layoffs, the court concluded that "the evidence that the layoffs and selective recalls were motivated by hostility to the union and its supporters is overwhelming." Pet. App. 6a. The court rejected petitioner's contention that *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), abrogated the Board's "longstanding rule, endorsed in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), that once the General Counsel shows that hostility to unionization was a factor in a layoff, the company has the burden of persuading the Board that the layoff would have occurred anyway." Pet. App. 6a.

ARGUMENT

Petitioner raises two contentions: (1) the amendment to the complaint should not have been permitted, and (2) the court and the Board applied an incorrect burden of proof. With respect to both issues, the decision of the court of appeals is correct, and does not conflict with any decision of this Court or of another circuit. Accordingly, review by this Court is not warranted.

1. Petitioner maintains (Pet. 9-19) that the decision to permit amendment of the complaint conflicts with the statute and with decisions of this Court, and is inconsistent with Board precedent. This claim is erroneous.

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[11] The court noted (Pet. App. 5a) that *Redd-I* involved a withdrawn charge, rather than, as here, a dismissed charge, but observed that the Board had applied the principle enunciated in *Redd-I* to cases involving dismissed charges, citing *Stern Entertainment System Inc.*, 290 N.L.R.B. No. 167 (Sept. 23, 1988).

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b).[12] Section 10(b) also provides that "[a]ny such complaint may be amended by the * * * Board in its discretion at any time prior to the issuance of an order based thereon." The courts of appeals have consistently held that "if additional allegations are closely related or sufficiently related to allegations contained in the charge or original complaint, § 10(b) will not be violated by allowing the complaint to be amended to include additional allegations even though the amendment takes place after the limitation period set forth in § 10(b)." *Rock Hill Tel. Co.* v. *NLRB*, 605 F.2d 139, 142 (4th Cir. 1979).[13] As the court below observed, the "closely related" doctrine is similar to the relation-back provision of Rule 15(c)

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[12] Under the Act, an unfair labor charge "set[s] in motion the machinery of an inquiry. * * * The responsibility of making that inquiry and of framing the issues in the case is one that Congress has imposed upon the Board," through the filing of a complaint. *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959).

[13] Accord: *Eastern Maine Medical Center* v. *NLRB*, 658 F.2d 1, 6 & n.3 (1st Cir. 1981); *NLRB* v. *Inland Empire Meat Co.*, 611 F.2d 1235, 1237-1238 (9th Cir. 1980); *NLRB* v. *Allen's I.G.A. Foodliner*, 651 F.2d 438, 441-442 (6th Cir. 1981); *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). In the context of amendments concerning conduct occurring after the filing of a complaint, this Court has also made clear that Section 10(b) does not preclude the Board from amending a complaint to include related matters not alleged in the underlying charge. *NLRB* v. *Fant Milling Co.*, 360 U.S. at 308-309, reaffirming *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 369 (1940). See also *NLRB* v. *Complas Industries*, 714 F.2d 729, 733 (7th Cir. 1983).

of the Federal Rules of Civil Procedure. Pet. App. 3a.

Contrary to petitioner's contention (Pet. 9-10, 14 & n.10, 16-18), *Local Lodge 1424, Machinists* v. *NLRB*, 362 U.S. 411 (1960), does not suggest that this "closely related" doctrine contravenes the limitations provision of Section 10(b). In *Machinists*, the union and the employer entered into a union security agreement at a time when the union did not represent a majority of the employees; a charge filed more than six months after execution of the agreement alleged that the continued maintenance of the agreement violated the Act. The Court held that the charge was barred by Section 10(b) because the contract could be invalidated only by referring to the union's lack of majority at the time of execution—a circumstance that existed more than six months before the filing of the charge.

The court of appeals' decision clearly does not conflict with the *Machinists* decision. Unlike the situation in *Machinists*, the finding that the mass layoff was an unfair labor practice does not depend upon any event occurring more than six months before the filing of a charge. In this case, a pending, timely filed charge alleged discrimination in recall from the layoff and the amendment to the complaint concerned events that were within six months of the filing of the original charge.[14]

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[14] Petitioner's citation (Pet. 10) to *Lorance* v. *AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989), is also inapposite. *Lorance* relied on *Machinists* in interpreting the analogous statute of limitations in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)). 109 S. Ct. at 2267-2268. Like *Machinists*, *Lorance* did not involve an amendment of a pending, timely charge to add closely related allegations.

Similarly, contrary to petitioner's assertion (Pet. 16), the decision below is not in conflict with decisions of other courts

As the court of appeals correctly noted (Pet. App. 5a), the fact that another charge embodying the substance of the amendment had previously been dismissed does not require a different result. That the charge had been dismissed bears only on a possible claim of prejudice—*i.e.*, a claim that such dismissal lulled petitioner into thinking that it would no longer have to defend against the layoff charge. Pet. App. 5a. But as the court noted (*ibid.*), petitioner does not argue "lull." [15]

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of appeals. *NLRB* v. *Silver Bakery Inc.*, 351 F.2d 37 (1st Cir. 1965), and *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964), involved reinstatement of completely withdrawn charges more than six months after the alleged unfair labor practice, without reference to any pending, timely charge. Nor is there any basis for petitioner's statement (Pet. 16 & n.12) that the decision below "implicitly conflicts" with *NLRB* v. *Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990). The court there did not "find merit" to the Section 10(b) argument, as petitioner asserts. It held that, while there "might be merit" to the contention, the employer had waived the defense by failing timely to raise it. 897 F.2d at 1236.

Petitioner's additional suggestion (Pet. 14, 17) that the mass layoff allegation was not, in fact, closely related to the charge alleging discriminatory recall of employees from that layoff also raises no issue warranting review. The Board, affirmed by the court below, reasonably found a sufficiently close relationship because the layoffs and recalls were part of the same sequence of events and were closely related in time, and because of the commonality of the evidence showing unlawful motive.

[15] Petitioner does not dispute that, after the amendment, it was given a full opportunity to prepare a defense. Pet. App. 54a. Moreover, at the time the complaint was amended, Board law clearly permitted the amendment. Pet. App. 37a.

Petitioner's suggestion (Pet. 11-18) that the Board's decision is an unjustified and unexplained departure from its decision in *Ducane*, *supra*, is also meritless. As the court of appeals correctly noted (Pet. App. 4a), the Board in *Redd-I* limited *Ducane* to attempts to revive dismissed or withdrawn allegations more than six months after the alleged unfair labor practice, "without reference to any other pending timely charge." Pet. App. 4a, quoting *Redd-I*. Moreover, as the court observed, *Ducane* did not address the "closely related" doctrine and thus provided no basis to conclude that it overruled that doctrine. *Redd-I* simply "ma[de] * * * explicit" the doctrine's continuing applicability. Pet. App. 4a.

The court of appeals (Pet. App. 4a) also properly rejected petitioner's related contention (Pet. 13) that the distinction drawn in *Redd-I* based on the existence of a closely related pending charge is unreasonable. Where one portion of a case has been dismissed but there remains an outstanding timely charge and a complaint based on that charge, the respondent will be proceeding with litigation, and thus reasonably remains liable for other closely related alleged unfair labor practices occurring during the six month period prior to the pending charge. In short, the pending charge puts the respondent on notice that allegations closely related to that charge may be added later, so long as they occurred no more than six months prior to that charge. See *Redd-I*, slip op. 10. By contrast, in the absence of any other pending timely charge, as in *Ducane*, it is reasonable for a respondent to assume that allegations in a dismissed charge cannot be revived outside the Section 10(b) period.

2. Contrary to petitioner's contention (Pet. 19-34), this case presents no issue of substance concern-

ing the allocation of the burden of proof in discrimination cases under the National Labor Relations Act. As the court of appeals found, the evidence supporting the Board's conclusion that antiunion hostility motivated the mass layoff and discriminatory recalls was "overwhelming." Pet. App. 6a.[16] Under the standard approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401 (1983), the Board's General Counsel therefore satisfied his burden of showing that the employee's protected conduct in selecting union representation was a "substantial or motivating factor" in petitioner's layoff decision. Once that showing of unlawful motive had been made, petitioner had the burden of establishing, as an affirmative defense, that there were also legitimate rea-

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[16] The Union's election victory was announced near the end of the workday on a Friday; on Sunday, petitioner telephoned 50 of the 92 unit employees at home and told them not to report for work on Monday (Pet. App. 56a, 80a-81a). Their indefinite layoff was confirmed by letter the following day (Pet. App. 56a). Before the election, petitioner threatened retaliation—including layoffs—if the Union won (Pet. App. 60a, 76a-77a). After the election, supervisors explicitly affirmed petitioner's retaliatory motive for the layoff and its determination not to recall employees who had attended a Union victory celebration, or otherwise demonstrated support for the Union (Pet. App. 63a-67a, 78a-80a). These facts, together with petitioner's other unfair labor practices, including its selections of identified Union supporters for layoff and its discriminatory refusals to recall, fully support the Board's finding of an antiunion motive for the mass layoff (Pet. App. 57a-66a, 75a-76a, 79a-82a, 95a-109a). Petitioner's threats and promises of benefit to discourage Union support (Pet. App. 60a, 62a-64a, 66a, 76a-77a) also belie its suggestion (Pet. ii, 2-3, 22 & nn.16 & 17) that its statements were mere expressions of "views, arguments, or opinion," which could not constitute or be evidence of an unfair labor practice under Section 8(c) of the Act.

sons for its decision, and that those reasons would have caused the employees' layoff and petitioner's selective failures to recall them, irrespective of their protected activity (*id.* at 400-403)—a burden that petitioner was unable to meet (Pet. App. 93a).[17]

As the court of appeals found (Pet. App. 6a), the showing of an unlawful discriminatory motive is precisely what distinguishes the present case from *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), on which petitioner relies (Pet. 26). That case, which arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, did not turn on whether the employer was motivated by a subjective intent to discriminate on a prohibited ground. 109 S. Ct. at 2120 n.4.[18] Rather, *Wards Cove* was litigated as a disparate impact case, where facially neutral business practices were alleged to impose a disproportionate burden on a protected group. In those circumstances, the Court concluded that "the plaintiff bears the burden of disproving an employer's as-

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[17] In concluding that petitioner failed to meet that burden, the Board did not, as petitioner contends (Pet. 24), ignore or fail to give appropriate weight to petitioner's economic justifications. Rather, the Board affirmed (Pet. App. 11a-12a) the findings of its ALJ, who exhaustively considered petitioner's evidence and found it unpersuasive (Pet. App. 82a-94a).

[18] The absence of any showing of unlawful motive—or, indeed, of any issues of unlawful discrimination—makes similarly inapposite petitioner's citation (Pet. 23 n.18, 27 n.20) of *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). In holding that the employer there was not obligated to bargain with the union concerning a partial closing, the Court emphasized that there was no allegation that the employer had acted for antiunion reasons. *Id.* at 682, 687.

sertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Id.* at 2126.

By contrast, where an unlawful criterion is shown to have "played a motivating part in an employment decision," the employer may avoid liability under Title VII "only by proving that it would have made the same decision even if it had not allowed [the unlawful criterion] to play such a role." *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1787-1788 (1989) (plurality opinion). See also 109 S. Ct. at 1795 (White, J., concurring in the judgment) (after plaintiff establishes an unlawful motive as a "substantial factor," burden of persuasion shifts to employer); *id.* at 1805 (O'Connor, J., concurring in the judgment) (after plaintiff establishes that unlawful motive was substantial factor such that a reasonable factfinder could draw an inference that decision was made because of plaintiff's protected status, burden shifts to employer).[19] In short, the Court applies in Title VII cases a rule analogous to the rule applied in cases under the NLRA where, as here, an unlawful motive for the employer's action is shown. Such a rule was held inapplicable in *Wards Cove* because specific intent to discriminate on an unlawful ground was not an element of the violation alleged there. Accordingly, the court of appeals in the present case properly rejected petitioner's contention that *Wards Cove* "revolutionize[d] labor law" by "abrogat[ing]" the rule approved in *Transportation Management* (Pet. App. 6a-7a).

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[19] Indeed, in *Price Waterhouse*, the Court explicitly relied on the *Transportation Management* analysis. See 109 S. Ct. at 1788, 1790 (plurality opinion); *id.* at 1796 (White J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SONICRAFT, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO THE OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO THE OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

This case squarely presents the question whether the Section 10(b) statute of limitations provides an employer any protection against stale claims and whether the burden of proof approach formulated under Title VII for indirect evidence of discrimination applies as well to unfair labor practice litigation commenced under the NLRA. Both these issues have yet to be considered by this Court. Each deserves the Court's immediate attention as illustrated by the responses of the Board and the Intervenor Union here and the diversity of opinions which have issued from the appellate courts.

1. The Board's fundamental error occurs because it lacks caselaw to rely upon for the enterprising proposition that Section 10(b) should not be strictly construed. Rather, the Board contends the General Counsel's amendment to the unfair labor practice complaint against Sonicraft of discriminatory layoff allegations was not out of time because Section 10(b) empowers the Board to amend complaints at any time. Such generalized authority for this improbable proposition is string-cited on page 12 of its brief. However, *none* of those cases involve situations where there has been an intervening dismissal of the matter by the General Counsel or a withdrawal of the charge.

Consequently, this Court is confronted with a question not squarely faced in *Local Lodge 1424, Machinists v. NLRB*, 363 U.S. 411 (1960), wherein the Board had improperly attempted to assert jurisdiction to proclaim a collective bargaining agreement unlawful because it had no continuing jurisdiction to remedy unfair labor practices. In much the same manner, the Board attempts to resurrect matters previously dismissed from an unfair labor practice charge, beyond the six-month period. Through the vehicle of amendments, without any recognition that the NLRA imposes a broad statute of limitations to protect respondents (as articulated in *Machinists*), the Board violates the statute.

If Section 10(b) is to have any effective purpose, the protection and repose for respondents contemplated by Congress also must be applied to protect intervening events from the assertion of Board jurisdiction. The Board clearly is not empowered to initiate a charge. Permitting it to amend previously dismissed portions of a charge runs against the clear congressional mandate against self-initiating Board charges and is an attenuated policy argument at best.

The Board very carefully straddles its own caselaw with the Seventh Circuit's approving conclusion that the "closely related" doctrine is properly applied, without providing this Court with a clear statement how its current thinking in *Redd-I, Inc.*, 290 N.L.R.B. No. 140 (1988), is permissible in light of 10(b) and *Machinists*. It also attempts to distinguish *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), on the basis that there was in that case an "absence of any other pending charge."

That distinction is a misstatement. Since the Board did indeed find that *Ducane* applied here in the first remand in the instant case, the statute of limitations in 10(b) could only afford one result, *viz.*, dismissal. In *Ducane*, there were two sets of charges, one involving McCrea and one involving Robinson. Long after McCrea's charge was dismissed, the union sought to add McCrea's occurrences to Robinson's ongoing complaint. The Board refused the General Counsel's request, flatly stating that "[w]e hold today that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals

the operative facts." *Id.* at 1390. The Board expressly reversed its earlier decisions in *California Pacific Signs, Inc.*, 450 N.L.R.B. 450 (1977)(a dismissal case) and *Winer Motors, Inc.*, 265 N.L.R.B. 1457 (1982)(a withdrawn charge case), to the extent they were inconsistent. Consequently, the Board's proposed distinction of *Ducane* is contrary to the clear language and factual setting in that case.

Since *Ducane* rejected an attempt to add formally dismissed allegations to a complaint, the Board's current proposition that the closely related doctrine is not an impermissible mechanism to bypass 10(b), is erroneous. In *Ducane* the Board specifically found that its application of 10(b) to both dismissed and withdrawn charges is required under the statute and not to do so "would exceed our own authority." 273 N.L.R.B. at 1391. "In either event, the charge has been disposed of and, in effect, ceases to exist." *Id.*

Therefore, even when the Board points out to this Court that the Seventh Circuit found its silent departure from the express language of *Ducane* here not unreasonable, that does not authorize the agency to randomly ignore its own precedents and apply new legal theories in the face of express statutory language. To act as it deems fit without accountability to the rule of law and faithfulness to the statute, cannot be substantially justified action within the meaning of Section 10(f) of the Act.

The only other stab made by the Board at deflecting the critical need for this Court to review the decision below is through distinguishing the decisions of the First, Second, and Third Circuits in *NLRB v. Silver Bakery, Inc.*, 351 F.2d 37 (1st Cir. 1965), *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964), and *NLRB v. Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990), in footnote 14, page 13-14 of its brief. The former two cases it claims involve an attempt to reinstate dead allegations without reference to any other pending charge and in the latter case, the Second Circuit in *Wizard Method* did not reach the question because it had not been timely raised (just as the General Counsel's failure to even raise the "closely-related" issue

to the ALJ should have barred him from doing so against Sonicraft ever since). Neither argument addresses the sound statutory policies underlying 10(b) articulated by these appellate courts.

We plead with the Court to recognize the critical importance of the issue. All the cases the Board claims do not conflict with the decision below, because of minor variations in the facts, do not deal with the effect of dismissals. Board Brief at 12 n.13. Given the known views of the First and Third Circuits, they would conflict with the Seventh Circuit's view here.[1]

The scope of the statutory puzzle further widens when the Court finds that in *Winer Motors, Inc.*, 265 N.L.R.B. at 1458, the Board expressly renounced its prior "equitable" rules regarding the amendment of complaints, and adopted the First Circuit's decision in *Silver Bakery, Inc.*, *supra*: "we agree with the First Circuit's assessment when it denied enforcement of our Order in *Silver Bakery* that reinstatement of charges beyond the 10(b) period based on equitable considerations was created out of whole cloth and that: ...'we can think of no good reason why the mere filing of a charge...should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of proceedings without limit of time.'" *Quoting*, 351 F.2d at 39. Hence, the Board in *Ducane* found that its "sympathies in that regard [are] an insufficient basis to restrike the balance established by Congress when it added the proviso to

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[1]Involved here is the effect a final dismissal has on the central issue of a charge because the *Fant Milling* Court did not have before it the question whether there was a dismissal prior to amendment of the charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). Petitioner urges the rationale that once a charge is dismissed, it is gone. Since the Board is not authorized to self-initiate charges, it cannot do so either under the guise of an amendment.

Section 10(b). Accordingly, we hereby overrule *Silver Bakery* [150 N.L.R.B. 421 (1964)]."[2] *Id.*

It is inherently inconsistent policy for the Board to tell a respondent not to rely upon section 10(b) where portions of a case are dismissed or withdrawn and be always prepared to face the charge anew through an amendment to a different charge outside the 10(b) period. Therefore, the Court is told that where the General Counsel dismisses one part of a case and another portion remains, a respondent "reasonably remains liable for other closely related" charges, including the one upon which it had prevailed. This "rule" the Board claims is sufficient to put a respondent on notice to all other possible events during the pendency of the timely charge.[3] Brief at 15. In the face of 10(b), the "rule" is plainly fashioned out of the same "whole cloth" repudiated in *Ducane*, but is now said to be "traditional," as applied, to Petitioner.

Also noticeably absent from the Solicitor's brief, is that the new application of the closely related doctrine holds only a fleeting majority of the Board, as Chairman Stephens dissented in both the instant case and *Redd-I*, because the sequence of

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[2]The Board alleges in *Redd-I, Inc.*, the closely related doctrine it applied was "the traditional Board test," *Redd-I, Inc.*, 129 L.R.R.M. at 1231; Brief at 9 n.8. Yet, the only "test" the Board previously used was that the General Counsel had "virtually unlimited discretion" to reinstate previously dismissed charges. *California Pacific Signs, Inc.*, 233 N.L.R.B. at 451. Even in that case, the Board found that withdrawn charges via a private settlement could not be reinstated because of 10(b). *Id.*; *Koppers Co.*, 163 N.L.R.B. 517 (1967). Consequently, when the Board in *Redd-I*, 129 L.R.R.M. at 1231 n. 8, suggests that the closely related doctrine is well established, all its cases failed to involve dismissed or withdrawn charges.

[3]The Board places the burden of showing a denial of due process in these situations upon the charged party respondent. Fairness, the Board believes, is met by giving the respondent a brief opportunity to prepare after the amendment is made. Prejudice, the Board contends, does not overcome its perceived "duty to protect certain public rights." *Redd-I*, 129 L.R.R.M. at 1232.

events does not provide a respondent "even the most general notice" that it could be called upon to redefend the allegation. In his view, to do so would undermine the requisite statutory need for anything but the filing of simple non-specific charges: "I cannot agree with my colleagues that a charge has no notice function whatsoever. If it had no such function, there would be no reason for us to place the limitations of the relation back doctrine on subsequent amendments to a charge." *Redd-I, Inc.*, 129 L.R.R.M. at 1235. He further found that the majority cannot rationally believe that the intervening governmental act of a dismissal or withdrawal of a charge by the General Counsel would not lead a respondent to believe it might never again be called upon to defend that act or seek to preserve specific evidence for future litigation involving that situation. *Id.* Thus, 10(b) also serves to protect against abuse of process.

Finally, the Board does not deny that the Seventh Circuit unilaterally interposed the applicability of the case of *Stern Entertainment System, Inc.*, 290 N.L.R.B. No. 167 (1988)(2-1 decision), to prop up Board Counsel's attempt to prove that the Board's *Redd-I* precedent would apply to dismissed as well as withdrawn charges. It can only be surmised that *Stern* is applicable here since the Board never relied upon that case in ruling against Sonicraft, and *Redd-I* was a withdrawn charge case. If *Stern* is applicable to Sonicraft, it was the Board's obligation to say so, not the *post hoc* substituted reasoning of the Court of Appeals, which the Board does not deny has happened. *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438 (1965).

This Court should grant the Petition in this case and apply the rule enunciated by the Board in *Ducane*.

2. The dilemma posed in Petitioner's Second Question for employers, carefully not answered by the Board, is that the NLRA is a statute requiring the finding of discriminatory intent. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954). It is how the Board finds intent from legitimate business acts which is now an important issue for the administration of the statute. *NLRB v. Brown*, 380 U.S. 278, 286 (1965).

The problem represented by this case is the readiness of the Board to infer intent from neutral facts and arguably 8(c) employer protected speech. This case was never tried as a so-called "mixed-motive" case and Sonicraft always contended that its actions were solely based on reasons of economic preservation. The Board's aversion to articulating and applying a proper burden of proof is highlighted by both the presentation made to the Court in footnote 16 of the Board's *brief* at page 16, where it recounts the ALJ's findings of "threats and promises" and footnote 3 of its *decision* where it does not find Jerry Jones' speech to violate 8(a)(1), Pet. App. 13a n.3, but now for the first time also contends that Sonicraft's conduct was not protected under 8(c) of the Act. Sonicraft argued that same conduct was protected throughout these proceedings, but neither the ALJ or the Board ever addressed the issue.

This case is not about the presence of any direct evidence of an intent to retaliate against employees for voting for the union. Rather, like a Title VII disparate impact case, the Board reaches for indirect evidence, much like the use of statistics and inferences drawn from the disparate impact case, *e.g.*, the business timing, especially if the employer opposes unionization. This Board presumption is well-known. *See* Pet. at 22 n.16.[4]

Yet, it was not the Board that ruled that "antiunion hostility motivated the mass layoff," but the Seventh Circuit. The Board nowhere balanced Sonicraft's rights under 8(c) and the statutorily

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[4]In this situation, the entire layoff was nondiscriminatory and cannot be conclusive, when the Board relies only upon the timing and nonadjudicated 8(c) employer protected conduct. An employer has no rational reason to affirmatively prove the neutrality of all the uncontrollable factors the Board might rely upon, since the General Counsel is at all times to carry the burden of proof, as the EEOC and plaintiffs do under Title VII in *Wards Cove*.

recognized economic defense under the "for cause" provision of Section 10(c).[5]

The Court might be inclined to believe that the Board employs the test approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), but there is not even a minimal reference to any articulation or application of a recognized burden of proof here. Sonicraft met its burden of proof in this case by articulating and presenting its precipitous decline in profits and excess inventory, but the proof was not recognized by the Board or the Seventh Circuit or was so-called "unpersuasive." Board's Brief at 17.

If the Board's General Counsel had litigated this case in conformance with *Transportation Management*, he would have offered independent proof that Sonicraft's business reasons were untrue. He could not , for the joint economic testimony proved otherwise. Rather, he rested, as has the ALJ and the Board, on the premise that the employer's proof can simply be disbelieved. This has become a pattern of typical behavior, because the known tests do not relate well to alleged pattern or practices cases. The Board's *Wright-Line* and *Transportation Management* tests have only been applied in routine discharge cases where an employer alleges a rote "for cause" defense. The Board enunciated no standard of proof here and the record is void of *any* reference to an applicable standard. Thus, references to *Transportation Management* is the dicta of Board counsel's *post hoc* arguments to the Seventh Circuit and this Court.

This realization is the imperative that must cause the Court to revisit the issue and apply the test articulated by the majority

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[5]The General Counsel claimed he received newly acquired corroborative evidence to resurrect the dismissed charge. This evidence is, at best, borderline protected speech, which could only breach the bar of 10(b) if there was fraudulent concealment. That occurrence the Board refused to find here. *See* Pet. App. 3a; 13a n.2 ("we find it unnecessary to reach the fraudulent concealment issue"); *Ducane*, *supra* at 3.

in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), that the government bears the burden of proof throughout these proceedings and put the NLRA and Title VII back on the same footing when using indirect evidence. Even the Board admits that "the Court applies in Title VII cases a rule analogous to the rule applied under the NLRA." Brief at 18. Unfortunately, the Board refuses to do likewise.

Finally, even if the Court were to find that the instant case involved a "mixed -motive" situation, the burden of proof standard represented in the recognized *McDonnell Douglas* test would enable the trier of fact and parties to present their cases in a logical sequence akin to disparate treatment cases as well. For in these types of cases, the employer comes forward with its explanation and the General Counsel would continue to bear the ultimate burden of proof. Since the Board now absolutely refuses to apply a test that might work, even under the deference previously given to it in *Transportation Management*, this case presents an opportunity to clarify the required standards of proof.

Petitioner's proposed standard would be workable and already works well under Title VII. As the dissenters in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1812 (1989), forecast in the civil litigation context, "almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of 'stray remarks' or other evidence of discriminatory animus." It is the same stray *remarks by persons unconnected with decisionmaking* and the confluence of neutral factors, such as the timing of an employment decision, from which the Board substitutes as intent. This case shows an abuse of the earlier deference given to the Board.

Similarly, Justice O'Connor's concurring opinion in *Price Waterhouse* reflects that even in an intermediate case of mixed motive, the employer's burden is to articulate valid supporting reasons that "demonstrate that with the illegitimate factor removed from the calculus, *sufficient* business reasons would have induced it to take the same employment action." 109 S. Ct. at 1804 (emphasis added). *See also* 109 S. Ct. at 1796 (White, J.

concurring in judgment)("where the legitimate motive found would have been ample grounds for the action taken...this should be ample proof.").

Finally, the proof the employer offers in support of its non-discriminatory reason should not be set aside by the Board and substituted for a discriminatory reason unless the General Counsel proves that the employer's reason is a pretext for discrimination. If the "judiciary should proceed with care before mandating that an employer must adopt" a Title VII plaintiff's proposed hiring practice, the Board should be similarly limited in restructuring employer practices. *Wards Cove*, 109 S. Ct. at 2127.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Court grant a writ of certiorari to the Seventh Circuit to review these important questions.

Respectfully submitted,

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